

**ONTARIO PUBLIC SERVICE  
LABOUR RELATIONS TRIBUNAL  
DECISIONS**

TRIBUNAL DECISIONS

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# ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL DECISIONS

1985

File No.	Date	Type and Disposition	Indexed
T/0001/85-1	Nov. 26/85	Bargaining Authority;	Yes
T/0001/85-2	April 16/86	Allowed in part Supplementary; Dismissed	Yes
T/003/85	April 21/86	Unfair Labour Practice; Consent Order	No
T/0007/85	Mar. 29/89	Unfair Labour Practice; Dismissed	Yes
T/0008/85-1	Aug. 15/88	Successor Rights; Allowed	Yes
T/0008/85-2	Nov. 3/92	Successor Rights; Interpretation	Yes
T/0008/85-3	Aug. 24/93	Successor Rights; Interpretation	Yes
T/009/85	Dec. 3/85	Bargaining Authority; Allowed in part	Yes
T/0019/85	Mar. 30/89	Employee Status; Allowed in part	Yes
T/0020/85	Feb. 13/86	Certification; Allowed	No
T/0021/85	Mar. 20/87	Employee Status; Allowed	Yes
T/0022/85-1	Feb. 11/86	Certification; Preliminary; Allowed	Yes
T/0022/85-2	Oct. 10/86	Dismissed	Yes
T/0027/85	June 8/87	Successor Rights; Allowed	Yes





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<b>File No.</b>	<b>Date</b>	<b>Type and Disposition</b>	<b>Indexed</b>
T/0031/85	Apr. 15/87	Duty of Fair Representation; Dismissed	Yes
T/0036/85	Feb. 27/87	Unfair Labour Practice; Dismissed	Yes
T/0037/85 - see T/0036/85			
T/0039/85	Nov. 3/86	Religious Objection; Dismissed	No
T/0040/85	Nov. 25/86	Religious Objection; Dismissed	No

















Ontario Public Service  
Labour  
Relations  
Tribunal

Fonction Publique de l'Ontario  
Tribunal Administratif  
des Relations  
du Travail

180 Dundas Street West, Suite 2100, Toronto, Ontario M5G 1Z8

416/598-0688

T/0001/85-1

T/0001/85

**BETWEEN:**

The Crown in Right of Ontario  
(The Workers' Compensation Board)

Applicant

- and -

Canadian Union of Public Employees,  
Local 1750

Respondent

**BEFORE:**

Owen B. Shime, Q.C., Chairman  
E. C. Witthames and  
J.H. McGivney, Q.C., Tribunal Members

**FOR THE UNION:**

Mr. Michael Mitchell, Counsel  
Sack, Charney, Goldblatt & Mitchell  
Barristers & Solicitors

**FOR THE EMPLOYER:**

Mr. Chris Riggs, Q.C.  
Hicks Morley Hamilton Stewart Storie  
Barristers & Solicitors







## DECISION

This is an application pursuant to Section 40 (2) in which it is alleged that certain proposals made by the respondent union during bargaining are not within the scope of collective bargaining under the Act. The Union maintains that the proposals in issue are concerned with technological change and health and safety and fall within the scope of bargaining under the Act.

Under Section 7 of the Act the union is entitled to bargain about a wide range of matters. Section 7 provides as follows:

Upon being granted representation rights, the employee organization is authorized to bargain with the employer on terms and conditions of employment, except as to matters that are exclusively the function of the employer under subsection 18 (1), and, without limiting the generality of the foregoing, including rates of remuneration, hours of work, overtime and other premium allowance for work performed, the mileage rate payable to an employee for miles travelled when he is required to use his own automobile on the employer's business, benefits pertaining to time not worked by employees including paid holidays, paid vacations, group life insurance, health insurance and long-term income protection insurance, promotions, demotions, transfers, lay-offs or reappointments of employees, the procedures applicable to the processing of grievances, the classification and job evaluation system, and the conditions applicable to leaves of absence for other than any elective public office or political activities or training and development. R.S.O. 1980, c. 108, s. 7.

Section 18 of the Act grants the employer the exclusive function to manage and excludes certain matters from collective bargaining. That section provides as follows:





(1) Every collective agreement shall be deemed to provide that it is the exclusive function of the employer to manage, which function, without limiting the generality of the foregoing, includes the right to determine,

- (a) employment, appointment, complement, organization, assignment, discipline, dismissal, suspension, work methods and procedures, kinds and locations of equipment and classification of positions; and
- (b) merit system, training and development, appraisal and superannuation, the governing principles of which are subject to review by the employer with the bargaining agent,

and such matters will not be the subject of collective bargaining nor come within the jurisdiction of a board.

This Tribunal has had occasion to deal with a number of situations where there was a disagreement about whether the proposals fell under Section 7 or Section 18. In O.P.S.E.U. v. The Crown in Right of Ontario T/32/81 this Tribunal stated as follows:

While there are issues that fall clearly within either Section 7 or 18 it is readily apparent from the proceedings in this matter that many issues are capable of being interpreted as falling under both sections. The dilemma facing the Tribunal is to determine under which heading a particular proposal falls. That dilemma may be illustrated by one of the proposals put forth by the Union which it alleges is a safety matter. There is nothing in the Act which prohibits bargaining about safety. However the safety proposal provides that no employee will be required to work alone in a mental retardation, psychiatric or correctional facility. The employer resists the proposal on the basis that the union has infringed the employer's exclusive right to determine complement. Since the proposal clearly involves numbers of employees it is obviously capable of being interpreted in the manner suggested by the union and in the manner suggested by the employer. How then is this Tribunal to resolve the issue?

There is no reason why the two sections of the Act cannot stand together. There are many instances where the law has resolved what appears to be conflicting statutory provisions. See e.g. Re Metropolitan Toronto Board of Commissioners of Police and Metropolitan Toronto Police Association (1975) 8 O.R. (2nd) 65. In order to determine under what section of the Act a particular proposal falls one must examine the proposal objectively in order to determine the basic nature and effect of the proposal. If after examination the proposal may reasonably be considered to fall under Section 7 it is permissible subject for bargaining notwithstanding that it may touch on matters that fall within Section 18. The converse is also true; thus if after examination, the nature and effect of the proposal are such that





After considering the proposals and the arguments it is our view that there is nothing in the Article 6.05 1 definition section that infringes on the employer's functions under Section 18. While Section 6.05 2 of the proposal approaches an extreme position, it only requires reasonable efforts by the employer to minimize the effects of technological change and accordingly does not infringe Section 18. These proposals are allowed.

Proposals 6.05 3, 4, and 5 dealing with advance notice, data to be provided and consultation, are provisions which are not unusual in technological change clauses and leave the employer's management functions intact. The proposal is allowed.

Proposal 6.05 6 is somewhat debatable since it requires a form of interest arbitration during the currency of the agreement of measures to protect employees from the adverse effects of technological change. There is nothing wrong with arbitrating such differences during the currency of a collective agreement. That does not mean that this Tribunal is prepared to give a blanket approval to all measures proposed by the union in such proceedings. In our view the measures proposed must conform with the Act, notwithstanding that such proposals are made during the currency of a collective agreement. In that respect it is our view, that the measures proposed do not violate the Act since Section 40 (2) allows this Tribunal to scrutinize the measures. Accordingly that proposal is allowed.





Proposal 6.05 7 which purports to guarantee employment in our view is too extreme and infringes the employers right under Section 18 to determine complement. This Tribunal in O.P.S.E.U. v. The Crown in Right of Ontario T/15/84 previously dealt with a similar provision and indicated as follows:

"After considering the submissions of the nature and effect of the proposed Article 24.3 is to prohibit lay-offs entirely. There is no doubt that the union is entitled to bargain about lay-off pursuant to Section 7 of the Act. However, it still lies with the employer to determine complement and organization under Section 18 of the Act. As well, there is an element of discretion, as the employer has pointed out, under Section 22.4 of the Public Service Act. The union's proposal completely eliminates the jurisdiction of the employer by, in effect, prohibiting lay-offs entirely. The proposal is too extreme and is therefore disallowed."

For these reasons the proposal is disallowed.

Proposal 6.05 8 insofar as it attempts to guarantee wages of persons who are indeed laid off is disallowed. However, to the extent that it attempts to "red circle" wages of employees who are not laid off and still working it is allowed. That provision shall therefore be redrafted to insure that it is dealing with employees whose employment has not been terminated or who have not been laid off.

Proposal 6.05 9 which allows adversely affected employees to transfer into vacant positions or bump junior employees rather than being laid off is not unusual and does not offend Section 18. It is well within the ambit of the unions right to bargain about lay-off under Section 7. The proposal is allowed.





Proposals 6.05 10 and 11 purport to deal with training. Section 18 of the Act provides that it is the exclusive function of the employer to train and develop. Thus on its face these proposals offend against Section 18. In context the thrust of the provision is to prevent the lay-off of employees whose skills are inadequate for the new methods of operation. By upgrading those skills presumably these employees will be able to continue to work in the new operation. Objectively the nature and thrust of the proposal is to prevent lay-off and thus is allowed.

Proposal 6.05 12 seeks to curtail the employer's right to hire. In our view this proposal in context goes beyond the protection of jobs for existing employees. There is considerable protection for employees against lay-off in the other proposals. Thus, in context, when this proposal is carefully examined, it appears to encroach on the employer's function under Section 18 of the Act which includes the right to determine both employment and complement and accordingly is disallowed.

Proposal 6.05 13 purports to deal with new types of jobs and new classifications. To fill those jobs the employer may hire outside people or assign existing employees. The act of hiring is generally that of the employer. Once hired, people are assigned to different jobs and thus fall into certain classifications. Hiring is embraced by the term employment in Section 18; as well, organization and assignment and classification of positions are functions which are assigned exclusively to the employer. The unions proposal compels the employer to classify "new classifications or positions" created or changed by technological change as bargaining unit positions. Thus, in that regard, the proposal infringes the mentioned provisions of Section 18 of the Act. There is nothing in Section 7 which appears to give the union the right to force such a decision.





Moreover the union has an immediate right to apply to the Tribunal under Section 40 should any question arise as to whether a person is a employee. Thus the proposal not only infringes Section 18 but also appears to pre-empt the statutory procedures for determining such issues. For these reasons also the proposal is disallowed.

Proposal 6.05 14 prevents individual work measurement and the employer submits that this proposal encroaches on its exclusive function to appraise employees under Section 18 of the Act. The union suggests that the proposal is a health and safety proposal which minimizes the adverse effects or stress and that particular appraisal methods may "have adverse effects on individual employees' human dignity, and health and safety".

On balance we are not persuaded by the union's mere statements that appraisal would impair an employee's health and safety and thus we find the proposal is contrary to the employer's right to appraise employees under Section 18 of the Act and is disallowed.

The next group of proposals is concerned with Health and Safety matters. The employer objects to paragraph 3 because it alleges that it violates its' authority over "kinds and locations of equipment" under Section 18.

The employer also argues that the Labour Management Rehabilitation Committee concerns itself with discipline and discharge and again encroaches upon the employer's authority under Section 18.





The final objection is to paragraph 8 which the employer claims runs contrary to its' authority over training and development.

The union submits that the equipment suggested is to be utilized to monitor the work environment and is therefore directed to health and safety and does not infringe upon the employer's right to select equipment for the performance of an employee's duties.

The union further submits that the CPR training does not infringe upon the employer's right to train employees in the performance of their jobs but is training with respect to health and safety related matters.

And finally the union submits that the Labour Management Rehabilitation Committee has the power to recommend but does not detract from the employer's right to make final determinations with respect to discipline and suspension.

The dispute in this matter is clearly one where we must examine the basic nature and effect of the proposal.

Clearly the proposal relating to monitoring equipment is for the purpose of detecting health and safety hazards. It does not relate to equipment that is normally used by employees in the performance of their duties. Surely the right under Section 18 to determine the kinds and locations of equipment is given to enable the employer to determine work related matters or equipment that employees use to perform their normal duties. The equipment suggested is adjunct equipment for health and safety purposes and accordingly the proposal is allowed. See also O.P.S.E.U. v. The Crown in Right of Ontario T/19/84.



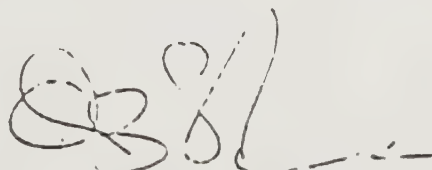


Similarly the training of employees in Cardio Pulmonary Resuscitation courses is a health and safety matter. There is no requirement that the employer train these people. Moreover the training is not for anything that is work related or required by the employees in the course of performing their duties. It is training that might be used by employees in health and safety related matters and accordingly is allowed.

Insofar as the Labour Management Rehabilitation Committee is concerned, its' powers do not extend to usurping the employer's right to discipline or dismiss employees. The Committee is limited to making recommendations in a health related context. The employer still has the final authority to discipline and dismiss. Thus, in context, it is our view that this proposal is one that is health related and does not infringe on the employer's right to discipline or dismiss and is allowed.

And finally the union has submitted certain arguments concerning the impact of the Charter of Rights and Freedoms on the provisions of The Crown Employees Collective Bargaining Act. Our decision in that respect is reserved and is subject to oral argument by the parties. Should the union wish to pursue the matter it shall advise the Registrar who shall fix a date for argument. In that respect the matter is referred to the Registrar.

DATED at Toronto, Ontario this 26th day of November, 1985.

A handwritten signature in dark ink, appearing to read 'Owen Shime', is written over a horizontal line.

Mr. Owen Shime for the Tribunal



IN THE MATTER OF DISPUTE

BETWEEN

CANADIAN UNION OF PUBLIC  
EMPLOYEES, LOCAL #1750

and

WORKERS COMPENSATION BOARD

T/1/85  
Section 40 (2)

PARTIAL DISSENT - EDWARD C. WITTHAMES (MEMBER)





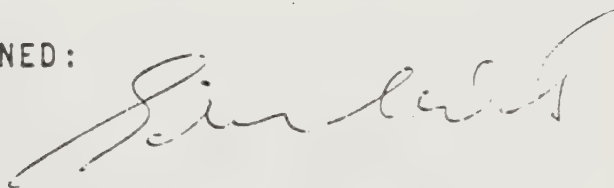
I have had an opportunity to review the Majority Award in this matter. Again, the Tribunal and the parties are victims of the confusion created by Sections 7 and 18 of the C.E.C.B.A., which is the instrument the Tribunal has to administer. In light of the foregoing, I am able to join the Chairman and my colleague in that award except with respect to 6.05-14.

6.05-14. No Individual Work Measurement

It is recognized that volume measurement may be necessary to obtain an objective evaluation of the level of production of a group, a section or an office. However, there shall be no individual work measurement.

Work measurement of an individual can, and in most cases, does create a stressful condition. The Union's proposal is an attempt to provide a protection in the area of individual work measurement, and in their submission to the Tribunal, they brought to our attention that C.U.P.W. and the Treasury Board had such protective language in the current collective agreement. So it's not new to government agencies, our Federal government even accepts it. What the award in this case seems to avoid is the recognition by the chairman and my colleague that monitoring of employees is stressful and would therefore fall in the category of "Health" in Health & Safety which the Tribunal has in previous awards declared a "condition of employment.". Section 7 determines that to be within the Union's bargaining authority.

SIGNED:



EDWARD C. WITTHAMES  
Member





## APPENDIX A

### Article 6 - Layoff and Recall

#### Present Agreement

##### 6.05 Technological Changes

(a) In the event the WCB decides on the introduction of new equipment or material, or a change in the manner in which it carries on its operations that is directly related to the introduction of that equipment or material, the effect of which would be to adversely affect, in a significant manner the terms of employment of an employee, the WCB shall notify the Union three months in advance and meet to discuss ways of reducing the negative impact on the individuals directly involved.

(b) Where it is necessary for the Employer to layoff an employee because of the introduction of technological change in equipment or methods of operation, the Employer shall give at least two (2) months notice in advance of the change to the employees affected and to the Union.

(c) The matter will then be referred to the Joint Committee of the parties to discuss and to attempt to resolve the problem with relation to the reallocation and retraining of the affected employees with a view to minimizing the effects of the Employer action required to be taken.



## Article 6 - Layoff and Recall

6.05 Cont'd.

### Union Proposal

replace "WCB" with "EMPLOYER" throughout

Delete existing 6.05 and replace with the following:

#### 6.05 1. Definition

In this Article "technological change" means any change in:

- a) the introduction of equipment, material or processes different in nature, type or quantity from that previously utilized.
- b) in work methods, organization, operations or processes affecting one or more employees;
- c) in the location at which the work, undertaking or service operates;
- d) in the work, undertaking or service carried on by the Employer including any change in function performed and including the removal of any part of the work, undertaking or service.

#### 2. Adverse Effects to be Eliminated

In carrying out technological changes, the Employer agrees to make every reasonable effort to eliminate all injustices to or adverse effects on employees or any denial of their contractual or legal rights which might result from such changes.





## Article 6 - Layoff and Recall

### Union Proposal on 6.05 cont'd.

#### 3. Advance Notice

When the Employer is considering the introduction of technological change:

- a) The Employer agrees to notify the Union as far as possible in advance of his/her intentions and to update the information provided as new developments arise and modifications are made:
- b) The foregoing notwithstanding, the Employer shall provide the Union, at least one hundred and twenty (120) days before the introduction of a technological change, with a detailed description of the project it intends to carry out, disclosing all foreseeable effects and repercussions on employees.

#### 4. Data to be Provided

The notice mentioned in Article 6 (5) (3) shall be given in writing and shall contain pertinent data, including:

- a) the nature of the change;
- b) the date on which the Employer proposes to effect the change;
- c) the approximate number, type and location of employees likely to be affected by the change;
- d) the effects the change may be expected to have on employees' working conditions and terms of employment;

#### 5. Consultation

The Union and the Employer will meet and negotiate in good faith to reach an agreement through collective bargaining regarding the measures to protect the employees from any adverse effects.





## Article 6 - Layoff and Recall

### Union Proposal on 6.05 Cont'd.

#### 6. Arbitration

If the Employer and the Union fail to agree upon such measures, the matter shall be referred to a Board of Arbitration established under the provisions of the Crown Employees Collective Bargaining Act for the purpose of determining such matters.

#### 7. Guaranteed Employment

No regular employee shall be dismissed or have his/her regular hours reduced by the Employer because of a technological change.

#### 8. Income Protection

An employee whose job is changed or who is displaced from his/her job by virtue of technological change will suffer no reduction in normal earnings.

#### 9. Transfer Arrangements

An employee who is rendered redundant or displaced from his/her job as a result of technological change or other change shall be given an opportunity to fill any vacancy for which he/she has seniority and which he/she is able to perform. If there is no vacancy, he/she shall have the right to displace employees with less seniority, provided he/she is able to perform the job.

#### 10. Training Benefits

Where new or greater skills are required than are already possessed by affected employees under the present methods of operation, such employee shall, at the expense of the Employer, be given a period of



## Article 6 - Layoff and Recall

### Union Proposal on 6.05 cont'd.

#### 10. Cont'd.

time not to exceed one year, during which they may perfect or acquire the skills necessitated by the new method of operation. The training period may be adjusted subject to the availability of courses of instruction etc. There shall be no reduction in wage or salary rates during the training period of any such employee and no reduction in pay upon being reclassified in the new position.

#### 11. Training Period

The training period provided for in this Article shall be given during the hours of work whenever possible. Any time devoted to training due to technological change shall be considered as time worked.

#### 12. No New Employees

No additional employees shall be hired by the Employer until employees affected by the change, or employees on lay-off, have been notified of the proposed technological or other change and allowed a reasonable training period to acquire the necessary knowledge or skill to retain their employment.

#### 13. New Classifications

All new classifications or positions created as a result of technological change or current job classifications which are changed as a result of technological change shall be automatically included in the bargaining unit unless the Union and the Employer mutually agree to exclude them, or until such time as The Ontario Public Service Labour Relations Tribunal declares the incumbents to be persons employed in





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Article 6 - Layoff and Recall

Union Proposal on 6.05 cont'd.

13. Cont'd.

a managerial or confidential capacity subsequent to a referral under Section 1 (1) (h) of the Crown Employees Collective Bargaining Act. If the parties are unable to agree on the classification and/or rate of pay for the job in question the issue shall be resolved in accordance with this Article.

14. No Individual Work Measurement

It is recognized that volume measurement may be necessary to obtain an objective evaluation of the level of production of a group, a section or an office. However, there shall be no individual work measurement.



## Article 24 - Health and Safety

### New Articles - Union Proposals

#### 24.01

### Health and Safety

#### Co-operation on Safety

The Union and the Employer shall co-operate in promoting and improving rules and practices which promote an occupational environment which will enhance the physiological condition of employees and which will provide protection from factors adverse to employee health and safety.

There shall be no discrimination, no penalty, no intimidation and no coercion when employees comply with this Health and Safety Article.

#### Compliance with Health and Safety Legislation

All standards established under the Ontario legislation and regulations shall constitute minimum acceptable practice to be improved upon by agreement of the Union-Employer Health and Safety Committee or negotiations with the Union.

#### Monitoring Equipment

The Employer shall provide and maintain work place monitoring equipment for detecting and recording potential and actual health and safety hazards.

#### Disclosure of Information

The Employer shall provide the Union written information which identifies all the biological agents, compounds, substances, by-products and physical hazards associated with the work environment. Where applicable, this information shall include, but not be restricted to, the chemical breakdown of trade name descriptions, information on known and suspected potential hazards, the maximum concentration exposure levels, precautions to be taken, symptoms, medical treatment and antidotes.





## 24.01 (Continued)

### Health and Safety

#### Proof of Safe Substances

No substance shall be introduced into the worksite that has not been thoroughly tested as to its potential health effects upon any person who is exposed to it. The Employer shall provide the members of the Health and Safety Committee with documented proof that the use of the substance will not cause any adverse health effects. Members of the Committee shall have the right to veto such use.

#### Health and Safety Grievance

Where a dispute involving a question of general application or interpretation of this Article occurs, it shall be subject to the grievance procedure and steps 1 and 2 of the grievance procedure may be by-passed.

#### CPR Training

The Employer will make available to a sufficient number of employees the opportunity to attend a properly accredited Cardio Pulmonary Resuscitation (CPR) Course. Time spent attending this course will be considered as time worked, and the Employer will assume all costs, if any, of the course.

#### VDT Rest Break

Employees working on VDT and word-processing equipment shall be allowed a 15 minute break following each hour and a quarter (1 $\frac{1}{4}$ ) worked.



## Article 24 - Health and Safety

### 24.02 Labour Management Rehabilitation Committee

#### 1. Establishment of Committee

The Employer and the Union recognize that mental illness, alcohol and drug addition are medical disorders. They further recognize the social, personal and economic problems associated with them. Accordingly, the parties shall establish a joint Rehabilitation Committee consisting of three (3) representatives of the Union and three (3) representatives of the Employer to deal with these problems in the work force. The Committee shall enjoy the full support of both parties and shall be vested with the authority to make recommendations.

#### 2. Function of Committee

The Committee shall concern itself with the following general matters:

- a) An educational campaign concerning mental illness, alcoholism and drug abuse.
- b) The study of the incidence of mental illness, alcoholism and drug abuse in the work force.
- c) The establishment of a rehabilitation program in conjunction with appropriate social welfare and medical authorities.
- d) Encouragement of medical treatment and/or counselling.
- e) Recommendations of policy with regard to discipline, discharge and sick leave coverage where an employee's work performance has been impaired by such problems.

In order to achieve the above objectives, the Union and the Employer recognize that alcoholism, drug abuse and mental illness are illnesses and should be treated as such rather than as discipline problems. The individual employee will be given every opportunity to rehabilitate himself before any decision is taken by the Employer regarding disciplinary action. The Union and the Employer therefore agree that:

- (a) they will jointly establish an employee assistance program for the treatment of alcoholism, drug abuse and mental illness among employees which will be paid for by the Employer;





- (b) an employee who has an alcohol, drug abuse or mental problem must be advised, in the presence of a responsible union official, that the Employer is concerned about the effect of this problem upon his work performance;
- (c) the employee who is so advised must be given the opportunity to enrol in the employee assistance program established by the Union and the Employer.
- (d) the employee shall be given leave of absence for the period of his participation in the program and his seniority, rights and benefits to which he is entitled during such period shall continue.
- (e) only if the employee who has an alcohol, drug abuse or mental problem refuses to co-operate in the program can he or she be subject to discipline by the Employer.
- (f) any disciplinary action taken by the Employer against the employee is subject to the employee's right to grieve and to proceed to arbitration in accordance with the terms of this collective agreement.









File

Crown Employees Collective Bargaining Act, R.S.O. 1980, C. 108

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

T/0001/85

BETWEEN:

- The Crown in Right of Ontario  
(The Workers' Compensation Board)

Applicant

- and -

Canadian Union of Public Employees,  
Local 1750

Respondent

BEFORE:

Owen B. Shime, Chairman  
E. C. Whitthames and  
J. H. McGivney, Tribunal Members

FOR THE UNION:

Mr. Michael Mitchell, Counsel  
Sack, Charney, Goldblatt & Mitchell  
Barristers & Solicitors

FOR THE EMPLOYER:

Mr. Chris Riggs  
Hicks Morley Hamilton Stewart Storie  
Barristers & Solicitors



## SUPPLEMENTARY DECISION

This is an application by the employer pursuant to section 39 of the Crown Employees Collective Bargaining Act requesting the Tribunal to reconsider and revoke a part of a decision dated November 26, 1985, wherein it allowed the union's proposal with respect to technological change to proceed to a board of Arbitration.

The request by the applicant and the grounds upon which it relies are contained in a letter to the Tribunal dated January 2, 1986, which is as follows:

In accordance with section 39 of the Crown Employees Collective Bargaining Act ("Act"), we hereby request the Tribunal on behalf of the employer to reconsider and revoke that part of the Tribunal's decision dated November 26, 1985 with respect to the union's proposal on technological change 6.05(6).

The union's proposals on 6.05(5) and (6) provided as follows:

### 5. Consultation

The Union and the Employer will meet and negotiate in good faith to reach an agreement through collective bargaining regarding the measures to protect the employees from any adverse effects.

### 6. Arbitration

If the Employer and the Union fail to agree upon such measures, the matter shall be referred to a Board of Arbitration established under the provisions of the Crown Employees Collective Bargaining Act for the purpose of determining such matters.

The Tribunal on page 4 of its decision held as follows with respect to proposal 6.05(6):





Proposal 6.05(6) is somewhat debatable since it requires a form of interest arbitration during the currency of the agreement of measures to protect employees from the adverse effects of technological change. There is nothing wrong with arbitrating such differences during the currency of a collective agreement. That does not mean that this Tribunal is prepared to give a blanket approval to all measures proposed by the union in such proceedings. In our view the measures proposed must conform with the Act, notwithstanding that such proposals are made during the currency of a collective agreement. In that respect it is our view, that the measures proposed do not violate the Act since Section 40(2) allows this Tribunal to scrutinize the measures. Accordingly that proposal is allowed.

The Tribunal itself in its decision noted that the proposal 6.05(6) was "somewhat debatable". In our submission to the Tribunal the decision is wrong in law and should, with respect, be reconsidered and revoked.

The Act makes detailed provision for interest arbitration. In the case of a renewal of a collective agreement, the process is activated under section 22(1) of the Act by the provision of notice to bargain for renewal of the agreement, but "only during the period between the 90th and 120th days prior to the termination of the agreement". Subsequent to notice to bargain being given, provision is made in section 9 for a mediator where notice has been given under section 22. Where no collective agreement is realized, provision is made for the

establishment of a board of arbitration by the Tribunal under section 10 of the Act. Sections 11, 12, 13, and 14 are also directed in considerable detail to the constitution, powers and duties of a board of arbitration.

In our submission, what the Legislature has done under the Act is to create a complete and comprehensive system for establishing a new collective agreement including a complete code for the use of interest arbitration. In this connection, we refer to the views of Madame Justice Wilson in Re Grey-Owen Sound Health Unit and Ontario Nurses Association, 1978 24 O.R. (2nd) 510 which involved the right of the union to initiate binding arbitration with respect to future disputes between the parties.

In that case the Court in dealing with the Labour Relations Act said that "a review of the Act satisfies me that it was intended as a complete code of procedure for the collective bargaining process" (page 515). In our submission such comments apply with equal force to the provisions of this Act. Wilson J.A. noted further that "I can find nothing in the Act to suggest that collective agreements, except as already mentioned, were intended by the legislature to be reached by any means other than the statutory procedure". The statutory procedure certainly does not contemplate reference to interest arbitration during the currency of the collective agreement or the right of an interest board of arbitration to include such a term in the collective agreement. There is here a fundamental distinction to be drawn between the right to grievance arbitration with respect to alleged violations of provisions on technological change or any other article of the collective agreement and the right to interest arbitration during the currency of the agreement.



The Tribunal makes reference in its decision to its view that "the measures proposed do not violate the Act since Section 40(2) allows this Tribunal to scrutinize the measures". With respect, the authority under section 40(2) arises in the "in the course of bargaining for a collective agreement or during proceedings before a board of arbitration". The circumstances which would activate the Tribunal's authority here will only arise within the meaning of the Act itself: a "board of arbitration" is one appointed under the Act and "bargaining" is bargaining as contemplated under the legislation. Disputes therefore that arise "mid-term" would not activate the authority of the Tribunal under Section 40(2).

In summary, we therefore request the Tribunal to reconsider its decision on proposal 6.05(6) and revoke its decision on this point.

All of which is respectfully submitted.

The union responded by a letter dated January 23, 1986, which is as follows:

We are in receipt of a letter dated January 2, 1986 from the solicitor for the Workers' Compensation Board requesting reconsideration and revocation of part of the Tribunal's decision dated November 26, 1985 with respect to the union's proposal on technological change 6.05(6). The submissions of the Canadian Union of Public Employees, Local 1750 are set out below.

The powers of the O.P.S.L.R.T. to reconsider its decisions are formulated in the same terms as those contained in the Labour Relations Act with respect to the Ontario Labour Relations Board. It is submitted that similar policy considerations should inform the Tribunal in determining whether to reconsider a previous decision. The Ontario Labour Relations Board will generally not reconsider a decision unless (1) a party proposes to adduce new evidence which could not previously have been obtained by reasonable diligence and the new evidence is such that, if adduced, it would be practically conclusive, or (2) a party wishes to make representations or objections not already considered by the Board that it had no opportunity to raise previously: Sack and Mitchell, Ontario Labour Relations Board Law and Practice, p. 532.

It is submitted that none of the representations contained in the letter dated January 2, 1986 constitute submissions which could not have been made during the initial proceedings with respect to this matter, and that as a result the Tribunal should not exercise its discretion to reconsider in the circumstances of this case.

With respect to the submissions made on behalf of the Workers' Compensation Board, it is submitted that there is nothing in the Crown Employees Collective Bargaining Act which prevents the parties from agreeing to resolve disputes respecting technological change which arise during the course of a collective agreement by arbitration or which prohibit an interest arbitrator from imposing an arbitration mechanism of this nature. The use of arbitration as a dispute resolution mechanism to resolve disputes arising during the currency of collective agreements, so as to deal with issues which are either unforeseen or with which the parties wish to bargain during the currency of the collective agreement, constitutes a widespread practice, with a great deal of labour relations wisdom to commend itself. Thus, many collective agreements both in the private and public sectors which deal with technological change given its unforeseeable nature provide for the negotiation and arbitration of issues respecting technological change during the currency of the agreement. In this respect, see, for





While there is little doubt that the Crown Employees Collective Bargaining Act constitutes, as is stated by the solicitor for the Board, a "complete code", the real question is what is encompassed by that code. It is submitted that the submissions of the Board fail to point to any provision of the Act which prevents the parties from bargaining for or an interest arbitrator from imposing, arbitration of disputes related to technological change. Indeed, the parties themselves in their job evaluation procedures have inserted similar arbitration mechanisms which entitle the parties to refer a dispute between them with respect to job evaluation to arbitration.

The Board relies on dicta by Madame Justice Wilson in Re Grey and Owen Sound Nurses' Association (1978), 24 O.R. 510. The comments of Madame Justice Wilson must be read, however, in conjunction with the later decision of the Supreme Court of Canada in Haldimand-Norfolk Regional Health Unit et al. and Ontario Nurses' Association (1984), 150 D.L.R. (3d) 193 wherein the Supreme Court of Canada held that it was lawful for an interest board of arbitration to include binding interest arbitration with respect to a future collective agreement between the parties. If such a term can lawfully be inserted under the scheme of collective bargaining under the Labour Relations Act, clearly a term in an agreement providing for the resolution by arbitration of disputes relating to technological change is not offensive to the Crown Employees Collective Bargaining Act.

The Board also takes the position that the Tribunal is unable to scrutinize any measures proposed or imposed by such a board of arbitration. It is submitted that the terms "bargaining" and "board of arbitration" contained in the Act are wide enough to encompass collective bargaining and arbitration envisaged by the union's proposal. In the alternative, even if this is not the case, the Tribunal would be free to scrutinize such measures during subsequent rounds of bargaining or arbitration. Further, any decision by an arbitrator dealing with technological change could not conflict with the Act since:

- (1) the collective agreement is deemed to contain a provision which reserves certain rights to management. Any measures imposed by a board would have to be read in conjunction with the deemed provision;
- (2) it is clear from the decision of the Tribunal and the Act itself that both proposals made to and decisions made by a board of arbitration would have to comply with the Act and would be reviewable either before the Tribunal or in the courts.

As a result, we would request that the Tribunal not exercise its discretion to reconsider the above-noted decision. If the Tribunal determines that it will exercise its discretion to reconsider its decision, it should affirm its previous decision.

All of which is respectfully submitted.

Before dealing with the arguments it is relevant to set out section 40(2) of the Act which follows:





If, in the course of bargaining for a collective agreement or during proceedings before a board of arbitration, a question arises as to whether a matter comes within the scope of collective bargaining under the Act, either party or the board of arbitration may refer the question to the Tribunal and its decision thereon is final and binding for all purposes. 1974,c.135,s.15.

Originally this matter had been decided pursuant to the section 40(2) because the parties had been bargaining for a collective agreement and were proceeding to a board of arbitration.

It should be noted that under the Crown Employees Collective Bargaining Act a board of arbitration is an interest board of arbitration which has been formed pursuant to section 10 and 11 of the Act. What is generally known as grievance arbitration is dealt with by the Grievance Settlement Board pursuant to section 19 of the Act. Thus the term "board of arbitration" under the Crown Employees Collective Bargaining Act differs from the ordinary understanding of a board of arbitration as it is known in the private sector. A board of arbitration is clearly an interest board of arbitration formed pursuant to sections 10 and 11 of the Crown Employees Collective Bargaining Act and under section 40(2) the Tribunal exercises supervisory jurisdiction over boards of arbitration with respect to matters coming within the scope of Collective Bargaining under the Act.

After considering the arguments and the correspondence in the light of the legislation, we are of the view that submissions by the employer are correct. The legislature has created a complete and comprehensive system for reaching a Collective Agreement. The Act does not include a procedure



for references to an interest board of arbitration, of matters in dispute during the currency of a collective agreement. The purpose of the board of arbitration is to conclude a collective agreement and not to deal with interim issues that may be in dispute during the currency of a collective agreement. More important, because of the specific language of section 40(2), the Tribunal could not exercise its supervisory role over an interim board of arbitration in order to determine whether specific interim issues and proposals are found within the scope of bargaining under the Act. Article 6.05(6) as proposed were contrary to the scheme of the Act and it is our view that the submissions of Mr. Riggs on behalf of the employer are correct in law.

While we recognize the force of the unions arguments that there are many situations where an interest arbitration system is used to resolve matters during the currency of a Collective Agreement, it is our view that the scheme of the Crown Employees Collective Bargaining Act precludes such a method being utilized in the manner suggested by the union.

It is also important to consider the argument as to the policy to be adopted by this Tribunal in reconsidering its decision. We have in some instances adopted policy considerations that are similar to the Ontario Labour Relations Board where it is appropriate; however, we have also chosen to develop our own policy decisions in other situations. Under the Crown Employees Collective Bargaining Act this Tribunal deals with a limited number of cases between limited parties and thus the policies





adopted by the Ontario Labour Relations Board which prevents continual litigation and relitigation may not in every case be appropriate before this Tribunal. The Act allows us to reconsider where it is "adviseable to do so". In the particular circumstances of this case and bearing in mind the nature of the issues, the manner in which the Tribunal proceeded (there was no calling of evidence, nor were there witnesses) it is our view that this is a case where it is adviseable to reconsider our ruling. Accordingly our decision with respect to proposal 6.05(6) is revoked and the union's proposal refering matters to a board of arbitration is dismissed.

Dated at Toronto, Ontario this 16th day of April, 1986.

"O. B. Shime"

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O. B. Shime for the Tribunal







Crown Employees Collective Bargaining Act, R.S.O. 1980, C. 108

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

T/0003/85

BETWEEN:

OPSEU (Jenkins and Paul)

Applicants

- and -

The Crown in Right of Ontario  
Ministry of Community and Social Services

Respondent

BEFORE:

P. Picher, Chairman  
E. C. Witthames, Member  
R. J. Gallivan, Member

FOR THE APPLICANT:

P. A. Sheppard  
Barrister & Solicitor

FOR THE RESPONDENT

R. McCully  
Senior Solicitor  
Legal Services Branch  
Ministry of Community and Social Services

HEARING:

April 16, 1986





## DECISION

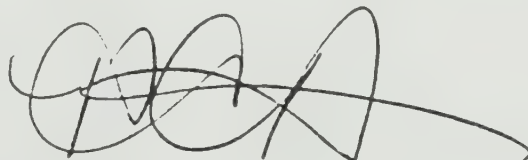
1. A complaint was filed under Section 32 of The Crown Employees Collective Bargaining Act, R.S.O. 1980 c. 108.

2. Upon agreement of the parties the Tribunal makes the following consent order:

Without precedent and without prejudice the parties hereto agree to the following consent order being made by the Tribunal:

1. The parties agree that their labour relations must be conducted in an atmosphere which is polite, courteous, and free from intimidation.
2. The parties agree that for a period of six (6) months from the date hereof Mr. Philip Morgan, the Manager of Vocational Services at the Adult Occupational Center (Edgar) and an area staff representative of O.P.S.E.U. will be present as observers during any discussions which may be conducted at stage 1 of the grievance procedure involving the complainant and the residential supervisor, Mr. Richard LaVerdiere and concerning the area of supervision over which Mr. LaVerdiere continues to have responsibility. The extension of time will be granted to ensure that this provision is accomplished.

DATED at Toronto this 21st day of April, 1986.



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P. Picher  
For the Tribunal











Ontario Public Service

Labour  
Relations  
Tribunal

Fonction Publique de l'Ontario

Tribunal Administratif  
des Relations  
du Travail

180 Dundas Street West, Suite 2100, Toronto, Ontario M5G 1Z8

416/598-0688

T/0007/85

**IN THE MATTER OF AN ARBITRATION**

**Under**

**THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT**

**Before**

**THE LABOUR RELATIONS TRIBUNAL**

**Between:**

OPSEU (Robert Anwyll)

**Complainant**

**- and -**

The Crown in the Right of Ontario  
(Ministry of Government Services)

**Respondent**

**Before:**

P.C. Ficher  
M. Sullivan  
R. Drennan

**Chairperson  
Member  
Member**

**For the Complainant:**

S. Goudge  
Counsel  
Gowling & Henderson  
Barristers and Solicitors

**For the Respondent:**

D.W. Brown  
Director  
Crown Law Office, Civil  
Ministry of Attorney General

**Hearings:**

February 20, 1987  
May 15, 1987  
November 12, 16, 1987  
September 13, 1988  
November 11, 1988



## DECISION

The Union has filed a complaint dated June 4, 1985 on behalf of the grievor, Mr. Robert Anwyll, alleging that by reorganizing the Operations and Maintenance Department in its London District Office through the privatization or contracting out of the fire alarm maintenance work, the Ministry of Government Services acted contrary to section 29 of the **Crown Employees Collective Bargaining Act**. More specifically, the Union maintains that in effecting the reorganization the Ministry interfered with the administration of the Union and discriminated against Mr. Anwyll because of his legitimate union activities. As a result of the reorganization, Mr. Anwyll's position as fire alarm mechanic was eliminated. Mr. Anwyll was unable to qualify for the upgraded, newly-created position of fire alarm inspector and was therefore moved to a downgraded position of maintenance mechanic 3 in a different location. In the new location, Mr. Anwyll was allegedly hampered in his ability to carry out his legitimate union activities, particularly because he was no longer able to travel as a regular part of his job and thus lost his means of regular contact with the membership throughout the district.

The specific sections of article 29 that the Union maintains have been breached by the Ministry are sections 29(1), 29(2)(a) and 29(2)(c) which provide as follows:

- 29.(1) **No person who is acting on behalf of the employer shall participate in or interfere with the selection, formation or administration of an employee organization or the representation of employees by such an organization, but nothing in this section shall be deemed to deprive the employer or any person acting on behalf of the employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.**



**29.(2) The employer or any person acting on behalf of the employer shall not,**

- (a) refuse to employ or to continue to employ or discriminate against a person with regard to employment or any term or condition of employment because the person is exercising any right under this Act or is or is not a member of an employee organization;**

...

- (c) seek by intimidation, by threat of dismissal or by any other kind of threat or by the imposition of a pecuniary or any other penalty or by any other means to compel an employee to become or refrain from becoming or to continue or cease to be a member of an employee organization, or to refrain from exercising any other right under this Act; ...**

[emphasis added]

#### **A. OVERVIEW:**

Mr. Anwyll's position with the Ministry of Government Services at the time relevant to the grievance was as one of three fire alarm mechanics in the London District. The Ministry has no complaint with the quality of his work. It is common ground that Mr. Anwyll was deeply involved in union activities. He was president of OPSEU Local 104 and subsequently a member of the Union's executive board. He was the Union's representative on both the local and provincial Joint Management/Union Employee Relations Board, the Union's representative on the local health and safety committee, a one time president of the OPSEU London Area Council (from 1982-1985), and is now a member-at-large. He served on five negotiating teams for Technical Services and in the 1985 negotiations was the Union's chief negotiator. It is undisputed that management was well aware of Mr. Anwyll's extensive union activities. Moreover, management regularly approved absences for him to enable him to participate





in these union affairs.

Of particular importance to the matter at hand, it is undisputed by the Ministry that Mr. Anwyll's approved absences for union activities generated a concern with management. His absences had a negative impact on the Ministry's ability to perform certain testing functions which were a regular part of Mr. Anwyll's duties as one of three fire alarm mechanics. His absences, along with the extensive absences due to a compensable illness or injury of one of the other two fire alarm mechanics, created a backlog in the fire alarm testing that had to be performed by the Ministry. Mr. D.J. Plumridge, the Regional Manager for the area covering the London District, testified that it was really the backlog of some 1,100 to 1,200 hours of work that caused him to recommend the privatization in the fire alarm area.

It is the position of the Union that the reorganization of the Operations and Maintenance Department in the London District Office of the Ministry of Government Services which resulted in a downgrading (albeit red circling) of Mr. Anwyll's position from that of fire alarm mechanic to maintenance mechanic 3, located in the London Courthouse, was motivated, in part, by Mr. Anwyll's legitimate union activities. The Union emphasizes that Mr. Anwyll's union activities contributed substantially to the backlog which, in turn, was the motivating force behind the reorganization, which then resulted in his downgrading. On this basis, the Union maintains that the reorganization was a breach of section 29(2) of the Act.

In addition, Mr. Anwyll was the only one of the related group who was downgraded. In the Union's assessment, the singularity of his adverse treatment constitutes discrimination contrary to section 29(2). The Union further maintains that



the downgraded move to the London Courthouse (because of the nature of his duties in that position which, unlike his former position did not enable him to travel around the London District and regularly communicate with the membership) interfered with his ability to freely carry out his legitimate union activities in his non-working hours. On this basis, the Union argues that the Ministry's reorganization and Mr. Anwyll's downgraded move to the London Courthouse constitutes a breach of section 29(1) of the C.E.C.B.A.

**B. FACTS RELATING TO THE REORGANIZATION:**

The Ministry's policy of privatizing different areas of the work of the Branch was initially communicated to Mr. Anwyll's superiors in 1981, at least four years before the London District reorganization. A memo dated September 1, 1981 directed to Regional and Area Managers from the Property Management Branch of the Ministry on the issue of privatization stipulated the following:

September 1, 1981

MEMORANDUM TO:      Regional Managers  
                         Area Managers

RE:                      Privatization

As you are aware, this Branch has for a number of years had a policy of privatizing as much as possible the operations of our Branch, both in Head Office and in the Regions, and we are very proud of what we have accomplished in this connection.

We have now been requested by the Assistant Deputy Minister to have each Region develop by December 15th of this year a detailed plan showing the prime functions that the Region is carrying out and indicating how they will privatize further and detailing a plan for each Region regarding this privatization.

This plan will naturally use as a base attrition by retirement and resignations as the main method of depleting of our existing staff. However, consideration to staff relocation and consolidation of particular types of operations in central Cities



of each Region should be given.

This subject will be discussed at the next Director/Assistant Director meeting on September 15, 1981 and further instructions will be issued.

"G.A. Mann"

Through this memo, the Regional and Area managers were directed by the Assistant Deputy Minister to set out a detailed plan showing how additional privatization could be achieved in the various regions. The memo expressly indicates that consideration should be given to staff relocation and consolidation of particular types of operations, which is what in fact occurred with the reorganization affecting Mr. Anwyll. Consistent with this memorandum, Mr. William Gibson, the Assistant District Manager of the London office between 1983 and 1985, stated that there had been a general policy in the government since 1979 that services like fire alarm maintenance services should be contracted out if such could be effected without causing a substantial problem for relocating staff. He testified that he participated in discussions concerning the reorganization of the London office from at least 1983. Mr. Anwyll stated that he could recall general discussions of privatization extending back to 1982.

Mr. Gibson testified to the reason why there was an enhanced need for privatizing the fire alarm maintenance in the London District in or around 1984. He gave three reasons, one of which was that they were running farther and farther behind in servicing due to both the extended absence of Mr. Gibbons, the fire alarm mechanic who was off on compensation, and the periodic absences of Mr. Anwyll for union activities. By the fall of 1984, the backlog in fire alarm preventive maintenance routines had developed into a problem that required attention.





A specific plan for privatizing the work of the fire alarm mechanics as part of a broader reorganization of the operations and Maintenance Department in the London District was set out in a memo dated January 15, 1985 from Mr. Plumridge, the Regional Manager, to Mr. Cote, the Assistant Director in charge of Ontario, with a copy for comment to Ms. Beth McCormick, the senior personnel administrator with the Ministry. Of particular significance to this complaint, the plan for the reorganization included a proposal to place all of the fire alarm preventive maintenance program (PMP) out to contract and to reclassify two of the existing fire alarm mechanics, including Mr. Anwyll, into newly-created, upgraded positions of fire alarm inspector. The fire alarm inspectors would become responsible for the inspection and administration of the PMP and would still report to the electrical supervisor.

The following recommendation respecting the fire alarm system is set out in the memorandum dated January 15, 1985:

**LONDON DISTRICT  
Changes Contemplated in  
The Organizational Structure**

...

Reviewing these three areas, the following is established:

**1) Fire Alarm Systems**

Within the District organization there are three Fire Alarm Technicians whose responsibility is to carry out the Preventative Maintenance program to all systems under our jurisdiction; provide a service to client Ministries for small fire alarm alteration work and assist in testing and supervising, with the Repair & Improvements Section, Major/Minor Fire Alarm contracts carried out by the private sector.



Currently, due to one Technician being sick and on Workmen's Compensation, and another being on the wage negotiation team for the Union Bargaining Group in London, the PM routines have fallen behind and the checking and listing of systems being installed by private firms leaves a lot to be desired, as the two memorandums from Mr. Gibson and Mr. Boniface will confirm (Appendix 'A' & 'B')

To overcome this problem, privatization of all Fire Alarms would be the best solution. In doing this, it would free two of the employees up to carry out inspections and supervision of contractors both in the PM and new installation contracts. To accomplish this, and showing the costs that would be involved, please see (Appendix 'C' and Organization Chart).

[Appendix 'C' and the Organizational Chart provide the names of the proposed incumbents in the proposed reorganization. It lists Mr. Anwyll and Mr. Viher (one of the other fire alarm mechanics) as Service Officers, the proposed upgraded category to do the fire alarm inspections and contract supervision. It notes that Mr. Gibbons was currently on Workers' Compensation and not expected to return to work prior to his retirement in 1986.]

## 2. Elevator Section

...

Once again, to overcome a serious shortfall in this area, it would be wise to privatize all of the elevator service and repair work, and make two of the current staff into inspectors; in doing this, one elevator position would become redundant. To see how the redundancy problem would be resolved and the cost involved, please refer to (Appendix 'C' and the Organization Chart).

...

[Appendix C also stated that because Mr. Hutchinson had the least amount of seniority in the elevator section, he would be transferred to the London Court House as Maintenance Mechanic 3 and red circled. This was the position in dispute that was ultimately assigned to Mr. Anwyll.]



4. London Court House

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In addition to this change, I would like to take the redundant [Mr. Al Hutchinson] elevator mechanic from the District office and place him in the Court House as a Maintenance Mechanic 3. My reasons for this is that the Building Manager has also the responsibility of the M.T.C. building and we would also like to have him look after the Ontario Savings Bank, and also help in administering some lease buildings adjacent to the Court House, thereby relieving the strain on the already over taxed Leasehold Administrator. If the above is accomplished, the Maintenance Mechanic would then be able to deputize for the Building Manager in his absence for vacation and sickness, plus there would be someone in the Court House to do minor repair jobs and he would know what was going on and in the other buildings.

I am sure that if we do this we will satisfy all of the clients' needs in the Court House and the other buildings (please see Appendix 'D' and Organizational Chart for details.

[emphasis added]

Appendix 'A' which is referred to in the above-described memo is a letter dated January 9, 1985 from Mr. Terry Boniface, the electrical supervisor, to Mr. W.R. Gibson concerning the backlog in the fire alarm system preventive maintenance program. It states the following:

January 9, 1985

MEMORANDUM TO:	W.R. Gibson
RE:	Fire Alarm System
	PM Program





As you are aware, we presently have a large backlog on our fire alarm P.M. program. We are presently attempting to clear this backlog through the use of contracted testing from private sector contractors as well as through the use of our own in house fire alarm technicians.

Due to the long term (or perhaps permanent) absence of John Gibbons, our inhouse staff has been reduced to two technicians, Iven Viher and Robert Anwyll. With this reduced staff, further absences due to illness, vacation or any other cause have a very serious impact on our program delivery. This is due to the fact that while it is not impossible, it is certainly not expedient to carry out our testing routines with only one technician.

It is therefore, in the best interests of our program delivery to keep any absences of the two remaining technicians to a minimum.

Submitted for your continuance.

"Terry Boniface"

Mr. Plumridge testified that he chose not to deny Mr. Anwyll leave for union business notwithstanding its contribution to the backlog because he believed that if the reorganization went through as planned, the backlog would rectify itself. There would then be sufficient people to do the work and Mr. Anwyll's periodic absences for union activities would no longer create a problem. In addition, Mr. Gibbons' continued absence on compensation was a greater contributor to the backlog than Mr. Anwyll's situation.

It is of importance to the positions of both parties that this initial proposal for reorganization in the memorandum dated January 15, 1985 had Mr. Anwyll slated for one of two proposed upgraded positions of fire alarm inspector, referred to in the memorandum as service officers I. The Union relies on this initial proposal respecting Mr. Anwyll as the base of its argument that the subsequent decision to put him in the



downgraded position of a maintenance mechanic 3 constituted discrimination against Mr. Anwyl for his union activities.

Counsel for the Ministry maintains, on the other hand, that because the original plan for reorganization dated January 15, 1985 recommends the placement of Mr. Anwyl in an upgraded position, any anti-union animus against Mr. Anwyl or any intention on the part of Mr. Plumridge to ultimately discriminate against Mr. Anwyl because of his union activities is highly improbable. Moreover, the Ministry emphasizes that because the document proposes that Mr. Al Hutchinson, one of the elevator mechanics, be red circled and slotted into the position of maintenance mechanic 3 at the London Courthouse, it establishes that as of January 15, 1985, the Ministry anticipated that the implementation of the privatization plans would cause some displacement and planned by way of solution that someone be placed at the London Courthouse. The Ministry relies on its original proposal to place a person other than Mr. Anwyl at the London Courthouse as evidence of the fact that it was not singling out Mr. Anwyl for adverse treatment because of his union activities when, in the Ministry's view, circumstances ultimately required that Mr. Anwyl be the person to be placed at the Courthouse.

The eventual plan for the reorganization is set out in a memo to Dara Dastur, the Director of the Southern Region, dated July 29, 1985 written by Mr. Plumridge. This proposal, which adversely affected Mr. Anwyl because it placed him in the downgraded position of maintenance mechanic 3 at the London Courthouse, was ultimately approved by upper management and then implemented. It, stipulated, in part, the following:



### **The Proposed New Format**

Currently contract documents are being prepared by the London District Technical Section for the contracting out of all preventative maintenance programs on the district's elevator and fire alarm systems.

When the above contracts are completed, the reorganization of the Fire Alarm and Elevator Sections will take place, and it is anticipated that the Manager of Operations will have the following staff reporting to him:

- 2 - Electrical Supervisors - Service Officer 1 to carry out all supervision and inspection of Electrical and Fire Alarm Systems with the London District for the Operational and Maintenance Section.
- 2 - Elevator Inspectors - Inspector 1 to carry out the inspections to all elevators being serviced by contractors, and make general recommendations concerning these contracts and the work being performed.

To accomplish the reorganization, the following will have to take place:

**Competitions will be held in the district for two (2) new Electrical Inspectors as these positions are new and embrace both electrical and fire alarm knowledge.**

As the two elevator inspectors positions are very closely related to the current elevator mechanics positions, it is contemplated that two of the current staff will assume these two new positions.

Once the above has taken place, the current Electrical Supervisor, Mr. T. Boniface, will be transferred into the Repair and Improvement Section to assist them in what is now an overload situation.

**At the time of writing, the Electrical Inspector positions have been advertised and four (4) applications have been received.**

Depending on who is successful for these two positions, will influence the two Elevator Inspectors positions, as one of the Elevator Mechanics, Mr. A. Hutchison, has applied for the Electrical Supervisor's position, as he has an Electrical Qualification.





In reviewing the reorganization of these two sections, it is evident that there are currently six (6) employees employed as Elevator Mechanics and Fire Alarm Technicians, and when reorganized, we will only need four (4) - 2 Electrical Inspectors and 2 Elevator Inspectors.

...

To overcome the problem of Mr. Anwyll and so not cause him to be redundant or have to move from London, it is the district's intent to create a Maintenance Mechanic 3 position at the London Court House, which Mr. Anwyll would be able to fill with his qualifications; it would mean he would be Red Circled until the Maintenance Mechanic 3 position caught up to his current position. The amount that Mr. Anwyll would lose per hour is approximately 17 cents.

[emphasis added]

The difference between the initial proposal for reorganization dated January 15, 1985 which had designated Mr. Anwyll for one of two upgraded positions of fire alarm inspector, on the one hand, and the final proposal of July 29, 1985, on the other, is that the final proposal combines fire alarm inspection and electrical inspection in one position, referred to as electrical inspector. The two separate fire alarm inspector positions were eliminated. This alteration in the proposed plan is critical to the problem raised in this complaint since a necessary qualification for the electrical inspector position is electrical certification.

In all likelihood, this complaint would not have arisen if Mr. Anwyll had had an electrical certificate. He would then have been qualified for the combined position under the name electrical inspector and in all likelihood would have been selected for the job. Mr. Anwyll, however, did not have an electrical certificate. Accordingly, once the decision was made to change the structure from the separated positions of fire alarm inspectors and electrical inspectors to the combined position of electrical



inspector, Mr. Anwyll was foreclosed from qualifying for the upgraded position.

The reason for this substantive change in the proposed reorganization of the fire alarm mechanics was the subject of evidence and argument. Mr. Plumridge testified that in response to classification concerns expressed by Ms. McCormick (the senior personnel administrator) arising from the January 15, 1985 proposal, they sat down to re-consider the most economical way to reorganize their resources based on available personnel. The alteration in the proposal which combined fire alarm inspection and electrical inspection under the single position of electrical inspector was generated, according to Mr. Plumridge, by the fact that when they re-assessed the situation subsequent to the January memorandum, there was a decided change in his own evaluation of the anticipated amount of fire alarm inspection work that would exist under privatization. Mr. Plumridge testified that in the original plan recommending two fire alarm inspector positions, he had determined that there would be enough work for one and one half people working full time as fire alarm inspectors. Mr. Plumridge stated that he considered Mr. Anwyll's union activities and decided that with his absences, two fire alarm inspector positions to cover work for one and one half full-time people would be appropriate. According to Mr. Plumridge, however, when he and his associates reviewed the situation anew after January of 1985, they concluded that there would be only enough fire alarm inspection work to cover 60 percent of one full-time position (instead of 150 percent, which was their original estimate for the January proposal). As well, they concluded that there was sufficient electrical inspection work to cover 140 percent of one full-time position.

The revised estimate for the combined workload for both electrical and fire alarm inspection therefore was 200 percent of one full-time position or two full-time





positions. On this basis, the recommendation was made by Mr. Plumridge that two electrical inspector positions be created with responsibility for both the fire alarm and electrical inspections. Mr. Plumridge stated that he did not consider it feasible to create one fire alarm inspector position and one electrical inspector because he believed it would be more efficient to have two people qualified to do both kinds of inspection work so that if one was absent the other could cover the jobs in both areas.

Ms. McCormick's evidence confirms Mr. Plumridge's evidence respecting the reason for the move away from the two fire alarm inspector positions. She testified that some time between February and April of 1985, Mr. Plumridge advised her either that he didn't have sufficient work for two full-time fire inspectors or that he wanted to add the electrical inspection component to the two positions. Ms. McCormick stated that the discussions made it clear that in Mr. Plumridge's opinion there was insufficient work to warrant two inspectors working only in fire alarm inspection.

The Union questions the legitimacy of the alleged explanation for the Ministry's decision to combine the fire alarm inspection work and electrical inspection work into one position. Of particular significance to the Union's submission in this regard is the evidence of Mr. Terry Boniface, who was the electrical supervisor in Operations and Maintenance in London. Among other areas of responsibility, he supervised the fire alarm maintenance work and performed, himself, all the electrical inspections. The Union submits that the legitimacy of the Ministry's explanation for the change is undermined because Mr. Boniface, the person closest to the fire alarm/electrical inspection area and closest to the backlog problems causing the reorganization, was of the opinion that a better reorganization would have been achieved by separating fire alarm inspectors and electrical inspectors rather than combining them in one position.





He believed that electricians would not have as keen an understanding of the fire alarm code. Mr. Boniface was part of the actual committee that selected the two electrical inspectors. He stated that Mr. Anwyll was better qualified for the fire alarm inspection part of the position than one of the two persons selected.

Mr. Boniface was not involved at the stage when the reorganization plan was being formulated. He first learned about the official reorganization plan on May 24, 1985 when it was announced to the staff. He then raised his concerns about the combined position with Mr. Plumridge. Mr. Plumridge confirmed that Mr. Boniface knew the fire alarm system better than he did, that he had more contact with the contractors and that he knew more about the fire alarm inspection that would be required. He further confirmed that Mr. Boniface felt that if they combined the work under the electrical inspector positions, there would be a question as to whether they would obtain as high a quality of fire alarm inspection as would be the case with persons solely dedicated as fire alarm inspectors. On cross-examination, Mr. Plumridge was asked if he disagreed with Mr. Boniface's views. He replied that he disagreed only from the point of view of the best utilization of manpower. Mr. Plumridge went ahead with the combined electrical inspector positions notwithstanding Mr. Boniface's reservations, on the basis that the Office had to obtain the best overall use of its resources.

The reorganization plans were announced to the staff at a meeting called by Mr. Plumridge for May 24, 1985. The Union relies on the circumstances of this meeting and the fact that it was not attended by Mr. Anwyll as evidence of Mr. Plumridge's negative treatment of Mr. Anwyll and his lack of due regard for Mr. Anwyll's interests.



Mr. Plumridge stated that when he convened the meeting he was not aware that Mr. Anwyll would not be there. Mr. Anwyll's absence was one of the first things he noticed when he entered the meeting; he was told that Mr. Anwyll was on vacation. Mr. Plumridge stated that although his first reaction was to cancel the meeting, he decided to go ahead with it since he had brought people in from the southern and western districts to tell them about the reorganization plans. Mr. Plumridge told the assembled group that no one would be hurt by the proposed reorganization because he'd taken steps to ensure that no one would be transferred out of the district. When somebody raised Mr. Anwyll's name, Mr. Plumridge acknowledged that Mr. Anwyll was the one person who would be most affected by the reorganization and stated that he would be discussing it with him. Mr. Ivan Viher, one of the other fire alarm mechanics, testified that at the meeting Mr. Plumridge commented that he had "something special" in mind for Mr. Anwyll. Mr. Viher thought that the statement was made in a sarcastic tone.

When Mr. Plumridge met Mr. Anwyll, on or about May 30th, after his return from Toronto, they spoke about the required qualification for the electrical inspector positions. Mr. Plumridge explained how to go about obtaining electrical certification. Mr. Anwyll testified that during the course of the May 30th meeting when his impending move to the London Courthouse was discussed, Mr. Plumridge commented that the job at the Courthouse would allow Mr. Anwyll to continue with his union activities and not interfere with the Ministry. Mr. Anwyll's complaint, however, was that the work would confine him to the Courthouse and he would no longer be in a position to travel around to various areas and talk to people in their off hours. Mr. Anwyll testified that he thought Mr. Plumridge was happy with the change in his union activities that





would inevitably follow upon his move to the London Courthouse since he would no longer have regular access to the membership through the travelling he had previously done as a regular part of his job.

Mr. Wayne Patterson was the Acting Manager of Operations and Maintenance in the spring of 1985. He testified that in April or May of 1985 he had discussions with Mr. Plumridge about the reorganization and the fact that the two electrical inspectors would need electrical certification. According to Mr. Patterson, Mr. Plumridge commented that Mr. Anwyll could try to get his electrical licence and that if he couldn't they could give him a special job. Mr. Patterson testified that Mr. Plumridge almost smiled when he said "We've got a special job for 'Smokey' [Mr. Anwyll]". Mr. Patterson commented that he thought they were "after [Mr. Anwyll's] butt". With respect to the relationship between Mr. Plumridge and Mr. Anwyll, Mr. Patterson said there was tension all the time. He said they were polite to one another but he could always sense tension. Mr. Patterson testified in cross-examination, however, that he does not believe that the reorganization was effected or used as a means to get rid of Mr. Anwyll.

The Union points to the negative aspects of the position to which Mr. Anwyll was transferred at the London Courthouse as further evidence of the Ministry's negative and discriminating treatment of Mr. Anwyll. First, the Union observes that the maintenance mechanic position at the Courthouse was a downgraded job for Mr. Anwyll, (albeit a red circled one) and one that involved menial tasks. Moreover, Mr. Anwyll was the only fire alarm mechanic to be downgraded. One of the other two (Mr. I. Viher) was upgraded to the electrical inspector position and the other (Mr. Gibbons) stayed off on Workers' Compensation until retirement. In the parallel reorganization of





the elevator mechanics, the Union emphasizes, none suffered the fate of Mr. Anwyll. Two subsequently retired and one subsequently obtained an upgraded position as an elevator inspector. In addition, the diesel mechanic became a diesel inspector.

Second, the Union complains about the dramatic way in which the position of maintenance mechanic 3 impeded Mr. Anwyll's union activities because it confined him to the Courthouse and deprived him of the opportunity he had in his previous position to engage in legitimate union activities in the places he would travel throughout the London District in the regular course of his duties as a fire alarm mechanic. The Union maintains that this negative impact on the exercise of Mr. Anwyll's legitimate union activities was or should have been obvious to management. Mr. Anwyll further noted that the location of the London Courthouse placed him in the geographic area of a different Union local, such that his right to most of his Union positions was brought into question. In the end, an accommodation was worked out by the Union to resolve that problem.

The Union further questions the legitimacy of placing Mr. Anwyll in the London Courthouse given that there is some evidence that a full time maintenance mechanic was not needed there. In the 1970s there was a full-time maintenance mechanic at the London Courthouse. When the individual terminated his employment with the Ministry, the position was never refilled. By a memo dated February 11, 1985 to Mr. Keith Lloyd, the Building Manager for the London Courthouse from 1974 until 1986, Mr. Gibson advised Mr. Lloyd that he had discussed the need for a maintenance mechanic at the London Courthouse "with senior management, and [that] they [did] not concur that [he needed] an assigned maintenance mechanic ...". According to Mr. Plumridge his management advised that it could not approve the resources necessary for the position



unless Mr. Plumridge could come up with the financing. The temporary arrangement that was put in place was to assign an individual to the building for a half day two days a month, for a three-month trial period in order to assist Mr. Lloyd with "some small repairs and improvements [that needed] to be executed in a timely fashion..." .

Mr. Plumridge testified that notwithstanding the initial failure to obtain approval from upper management for a full-time mechanical assistant at the London Courthouse and notwithstanding Mr. Gibson's opinion of what the need might be, he felt that Mr. Lloyd needed a full-time assistant. He was of the opinion that a building of the magnitude of the London Courthouse could not be adequately covered by only one person. By 1985 the building was getting old, falling into disrepair and needed care on a day-to-day basis. Moreover, Mr. Lloyd's health was failing and physically he could not make the frequent rounds necessary to stay on top of the required repairs. Not long after the temporary arrangement was set up to provide part-time help for Mr. Lloyd, approval was given for a full-time maintenance mechanic position at the London Courthouse, thus formally opened the position for Mr. Anwyll.

Mr. Plumridge described the quality of his general working relationship with Mr. Anwyll as fairly good. He noted that when he became the regional manager he allowed Mr. Anwyll to put up a specific bulletin board for union activities and allowed him to use the photocopier for any union documents he wanted to distribute. He stated that he never questioned Mr. Anwyll's union activities and asserted that they did not bother him. He commented that although he was concerned about the growing backlog in the fire alarm area it didn't affect his relationship with Mr. Anwyll.

Mr. Plumridge denied outright that the alteration from the original proposal for





reorganization in which Mr. Anwyll was slated to fill the proposed upgraded position of fire alarm inspector to the revised recommendation which combined the role of fire alarm inspection and electrical inspection in a position for which Mr. Anwyll was unable to qualify for lack of electrical certification was motivated in any way by Mr. Anwyll's union activities. On cross-examination, Mr. Plumridge refused to agree that he even knew that Mr. Anwyll did not have an electrical certificate when he made the alteration in the proposed structure. Mr. Plumridge commented that while he knew that Mr. Anwyll had not pursued electrical work within the Ministry, he did not know what he had done in his spare time. Mr. Plumridge asserted that in formulating both the original and revised recommendations for reorganization, he looked at available positions and how to best utilize available resources; he did not look at whether someone was in the Union or involved in union activities.

#### **C. DECISION:**

The Union concedes that due to his lack of electrical certification, Mr. Anwyll's inability to qualify for the upgraded position of electrical inspector followed inevitably from the decision to establish the classification. The Ministry's failure to appoint him to the upgraded position is not in issue. Instead, the focus of the complaint is the decision to establish the two positions of electrical inspector in preference to and to the exclusion of one or more fire alarm inspector positions.

Having carefully assessed the evidence and submissions, the Tribunal is fully satisfied that in effecting the reorganization and reclassifying Mr. Anwyll, the Ministry did not act contrary to the provisions of article 29 of C.E.C.B.A. In particular, the Tribunal is satisfied that the Ministry did not discriminate against Mr. Anwyll contrary





to section 29(2)(a) for engaging in union activities. The evidence readily establishes that the Ministry's privatization plans were wholly independent from Mr. Anwyll's union activities and set in motion well before Mr. Anwyll even returned to the London District from his period in Guelph. In addition, the privatization that was effected in the London District was consistent with and in furtherance of the Ministry's established policy respecting the privatization of such services. No anti-union animus on the part of Mr. Plumridge or anyone else has been established by the evidence. There is no evidence whatever on which to conclude that Mr. Plumridge or anyone else responsible for the reorganization was motivated by a desire to treat Mr. Anwyll adversely because of his union activities.

Instead the Tribunal concludes that the alteration in the original proposal for reorganization as set out in the January 15, 1985 memorandum (wherein the proposal was to have two electrical inspectors and two fire alarm inspectors, (which would have enabled Mr. Anwyll to be promoted) to the revised proposal containing the recommendation for two electrical inspectors only and no fire alarm inspectors (which for reasons fully set out necessitated Mr. Anwyll's downgrading) was made on the basis of business considerations only and had nothing whatever to do with Mr. Anwyll's union activities. The evidence establishes to the Tribunal's satisfaction that the reason for the alteration was a re-assessment between January and March of 1985 of the amount of work that would actually be available for the fire alarm inspectors and a conclusion that there would be insufficient work for two full-time fire alarm inspectors. The Tribunal finds that this evaluation was based on a review of the details of the actual private contracts for the fire alarm maintenance work and Mr. Plumridge's assessment as of the spring of 1985 of the volume of fire alarm inspection work that these contracts would generate. It was not motivated in any way by Mr. Anwyll's union activities.



The Tribunal is further satisfied that the decision to create two electrical inspector positions instead of, for example, one fire alarm inspector and one electrical inspector was based on business considerations, reasonably assessed, and the desire to have two persons qualified to cover both the fire alarm and electrical systems. Naturally, the Ministry's ability to cover the absence of one inspector was enhanced by having two inspectors who were qualified for both fire alarm inspection and electrical inspection. We readily find that the decision to combine the two functions in one position was not based on Mr. Anwyll's union activities.

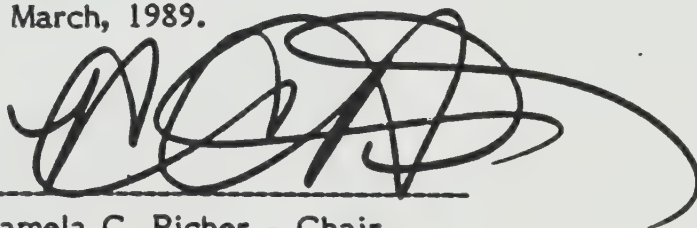
The evidence establishes to the full satisfaction of the Tribunal that none of the considerations that was taken into account in moving Mr. Anwyll to the downgraded position of the Maintenance Mechanic 3 at the London Courthouse was motivated by anti-union animus generated by Mr. Anwyll's legitimate union activities. It is readily apparent to the Tribunal that the decision to move Mr. Anwyll to the London Courthouse was viewed as a means of avoiding a need to move him out of the London District and was not intended to punish, discriminate against, threaten or intimidate Mr. Anwyll because of his union activities, contrary to sections 29(2)(a) or (c) of the **C.E.C.B.A.** The fact that the duties attached to the maintenance mechanic 3 position at the London Courthouse did in fact impede the ability Mr. Anwyll had had as a fire alarm mechanic to travel around the district and speak regularly with the membership on his breaks and non-working hours, does not establish that the Ministry interfered with the administration of the Union in breach of article 29(1) of the **C.E.C.B.A.** Mr. Anwyll did not have a right to a position that would enable him, as part of his job, to travel around the District. When the change in the assigned position carries no anti-union animus, as is the case in the instant matter, a resulting decrease in ability to



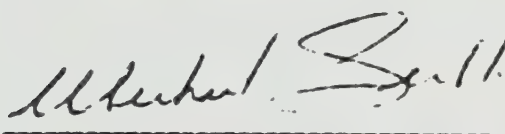
carry out union activities in off hours due to the location of the new job or the nature of the newly-assigned job duties does not establish a breach of the **C.E.C.B.A.** Standing alone, the fact that Mr. Anwyll's union activities contributed in some measure to the backlog which itself provided the impetus for the privatization of the fire alarm maintenance work does not constitute a breach of the **C.E.C.B.A.** simply because the reorganization did not allow Mr. Anwyll to carry out his union activities to the same extent and in the same manner as he had before.

In the result, for the reasons set out above, the Tribunal finds that the Ministry did not act in violation of the **C.E.C.B.A.** in effecting its reorganization and in placing Mr. Anwyll in the Maintenance Mechanic 3 position at the London Courthouse. Accordingly, the complaint is hereby dismissed.

DATED at Toronto this 29<sup>th</sup> day of March, 1989.



Pamela C. Picher - Chair



M. Sullivan, Member



R. Drennan, Member

ADDENDUM TO FOLLOW











THE SUCCESSOR RIGHTS (CROWN TRANSFERS) ACT, R.S.O. 1980 C.489

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

T/0008/85

Between:

Ontario Public Service Employees Union

Applicant

- and -

The Crown In Right Of Ontario, as represented  
by the Ministry of Health, District of Halton  
and Mississauga Ambulance Service Ltd. and  
Emergency Health Services, Central Ambulance  
Dispatch Centre

Respondents

Before:

J.H. Devlin, Vice Chairman  
W. Walsh, Member  
R. Drennan, Member

For the Applicant:

C. Paliare  
Counsel  
Gowling & Henderson  
Barristers and Solicitors

For the Crown in right of Ontario:

L. McIntosh  
Counsel  
Crown Law Office-Civil  
Ministry of the Attorney  
General

For the District of Halton  
and Mississauga Ambulance  
Service Ltd.:

J. Knight  
Counsel  
Mathews, Dinsdale & Clark  
Barristers and Solicitors

Hearings:

December 17, 1986  
June 3, 1987

Written submissions received March 2, 1988, March 23, 1988 and  
April 6, 1988.



DECISION

This matter involves an application pursuant to Sections 4 and 5 of the Successor Rights (Crown Transfers) Act. It is the position of the Union that the function of dispatching ambulances in the area of Halton and Mississauga is an undertaking which was transferred from the District of Halton and Mississauga Ambulance Service Ltd. ("the Private Service") to the Crown. In these circumstances, the Union contends that the Crown is bound by the collective agreement between the Union and the Private Service at the date of the transfer. It is the position of the Ministry that there was no collective agreement in effect between the Private Service and the Union when the Ministry began dispatching ambulances in the Halton, Mississauga area and that the dispatch function does not involve an undertaking which was transferred from Private Service to the Crown. Alternatively, it is the position of the Ministry that the character of the undertaking has changed so that it is substantially different from the undertaking as it was carried on immediately prior to the transfer.

The circumstances leading up to the Union's application are not in dispute. In 1973, the Ministry licenced the Private Service to provide ambulance service in Burlington and Oakville. Over the years, the Service expanded with the result that prior to June of 1985, the Private Service dispatched its own ambulances as well as the ambulances of one other private service from a location in Oakville to the entire area of Halton and Mississauga. As with other ambulance services in the





Province, the equipment and vehicles of the Private Service were the property of the Ministry of Health. The Dispatchers and Attendants of the Private Service were represented by The Ontario Public Service Employees Union and, for purposes of this application, there was a collective agreement in effect between the parties for the period from April 1, 1984 to March 31, 1985. In January of 1985, the Union served the Private Service with notice to bargain and the parties concluded a collective agreement in July of that year.

In the mid-1970's, the Ministry of Health developed a plan to operate a centralized ambulance dispatch service. The first Central Dispatch Centre was opened in Waterloo in 1979 and today, there are ten similar Centres throughout the province. In this case, the Central Dispatch Centre was to operate from a location in Mississauga and was to service Dufferin, Peel, York, Halton and Mississauga. In June of 1984, discussions took place between Dennis Munch, the District Manager of the Private Service, and representatives of the Emergency Health Services Branch of the Ministry of Health, with a view to the Ministry assuming responsibility for dispatching ambulances in the area of Halton and Mississauga in January of 1985. At that point, the dispatch function performed by the Private Service was to cease.

In late August of 1984, Dianne Cullen, then the Manager of the Central Dispatch Centre in Mississauga, advised the Private Service that she had received approval from the



Ministry to begin hiring Dispatchers. She further indicated that any Dispatchers hired by the Ministry would continue to work for the Private Service at its Oakville location until such time as the Ministry assumed responsibility for the dispatch function in the Halton, Mississauga area. At that time, it was still anticipated that the changeover would occur in late January of 1985.

In September of 1984, Jacqueline Gardner, a staff representative with the Union, wrote to Fred Rusk, the Regional Manager of the Emergency Health Services Branch to advise the Ministry that it was the Union's position that the Successor Rights (Crown Transfers) Act would apply to the transfer of the dispatch function and that any Dispatchers working for the Private Service who were hired by the Ministry for the Dispatch Centre in Mississauga, would continue to enjoy the benefits of the collective agreement between the Union and the Private Service. Subsequently, in October of 1984, Mr. Munch also wrote to Mr. Rusk asking that some consideration be given to the salaries and fringe benefits of Dispatchers employed by the Private Service who might be hired by the Ministry. It does not appear that the Ministry replied to either the letter from Ms. Gardner or the letter from Mr. Munch.

In October, 1984, the Ministry posted vacancies for five Dispatcher positions at the Centre in Mississauga and the five full-time Dispatchers employed by the Private Service



applied for these positions. In early 1985, four of the five Dispatchers were offered positions with the Ministry as Radio Operators 2. Richard Armstrong, the Regional Manager of the Central Western Region of the Emergency Health Services Branch, testified that the remaining applicant from the Private Service was not offered a position as he was not considered an acceptable candidate by the Ministry. In fact, the fifth position was not filled at that time.

In addition to the job competitions for the Dispatcher positions, the Ministry also advertised for an Assistant Manager, and Allan Duffin, the Dispatch Supervisor for the Private Service, was the successful applicant. Mr. Duffin commenced his employment with the Ministry in February of 1985.

Despite the Ministry's initial plan to begin dispatching ambulances in Halton and Mississauga in late January of 1985, it was not until June 3, 1985 that the Ministry actually took over the dispatch function. Prior to this time, the four Dispatchers hired by the Ministry continued to dispatch ambulances for the Private Service, as they had done in the past. The Ministry, however, provided these Dispatchers with a three-day training course in early April, 1985 to familiarize them with the equipment at the Dispatch Centre in Mississauga.





In early May, 1985, the Mississauga Dispatch Centre began dispatching ambulances in North Peel, Georgetown and Dufferin. Thereafter, on June 3, 1985, the Private Service discontinued its dispatch function and ambulance service in Halton and Mississauga was then provided directly by the Ministry. As some technical difficulties were experienced at the Dispatch Centre in Mississauga, however, Dispatchers hired by the Ministry who were previously employed by the Private Service, as well as at least one employee of the Ministry, dispatched ambulances from the Oakville location until June 10, 1985. Mr. Armstrong testified that this was simply a duty assignment for Dispatchers employed by the Ministry and was an interim measure to enable the Ministry to provide service until such time as the technical difficulties at the Centre in Mississauga could be rectified. Between June 3 and June 10, 1985, it would appear that supervision of the dispatch function at the Oakville location was provided by Mr. Duffin.

Subsequent to June 10, 1985 and the move to the Dispatch Centre in Mississauga, three of the Dispatchers formerly employed by the Private Service initially dispatched ambulances only in the area of Halton and Mississauga. After some period of orientation, they then began to dispatch ambulances to the larger area serviced by the Centre. The remaining Dispatcher from the Private Service assumed this latter responsibility immediately as he had worked for the Ministry on a part-time basis prior to June of 1985.



At the time of the move to the Dispatch Centre in Mississauga, some of the equipment from the Private Service was transferred to smaller Dispatch Centres in the Province and the remainder was stored. None of the equipment, however, was transferred to the Centre in Mississauga. With regard to those previously employed by the Private Service, Mr. Duffin testified that neither his skills as a Supervisor nor the skills of the Dispatchers were vital to the Ministry's operation. Mr. Duffin conceded, however, that initially the Dispatchers' familiarity with the Halton, Mississauga area was an asset.

Although the Ministry signed an agreement with the Private Service to obtain the telephone number previously used by the Service, Mr. Armstrong testified that this was done as an administrative convenience only and that, once again, the telephone number was not necessary or essential to the provision of the Ministry's dispatch service. The agreement which was executed indicates that the Ministry was to be responsible for any past indebtedness of the Private Service in connection with the use of the telephone number although, in fact, Mr. Armstrong testified that no payment was actually made by the Ministry in this regard. Mr. Armstrong also testified that no compensation of any kind was paid to the Private Service for the loss of the dispatch function. Mr. Armstrong explained that management compensation was paid by the Ministry to the Private Service on the basis of call volume and that this remained unchanged subsequent to June 3, 1985. While there was some reduction in



the monies paid by the Ministry for operating costs, there was a corresponding reduction in the salaries and benefits which the Private Service was obliged to pay.

Apart from the fact that the Mississauga Dispatch Centre services a much larger area and dispatches a larger number of ambulances than did the private service, there are also differences in the equipment used and the manner in which the dispatch function is performed. In the Private Service, there were two Dispatchers on duty, one of whom generally answered the telephone and determined the priority of the call and the location of the patient and the other dispatched the ambulance by simplex radio or by telephoning the base. In the Mississauga Dispatch Centre, employees rotate between the two positions of Call-taker and Dispatcher. The Call-taker receives the call, asks questions based on a structured format concerning the condition and location of the patient and determines the priority of the call. The Call-taker then passes an action form to the Dispatcher who determines the most appropriate vehicle to dispatch by referring to a vehicle status board which he calls up on a computer screen. The Dispatcher notifies the ambulance by individual or fleet paging, duplex radio or direct telephone line. The duplex radio operates on six channels which may function on multiple tower sites and the Dispatcher may be required to monitor several channels simultaneously. After notifying the appropriate ambulance, the Dispatcher then inputs information in connection with the dispatch onto a computer





terminal. During the course of his shift, the Dispatcher must also perform checks of the computer equipment and monitor the information on the terminal to determine the availability of vehicles.

Dispatchers at the Mississauga Dispatch Centre also appear to have responsibilities not previously exercised by Dispatchers employed by the Private Service. By way of example, Dispatchers at the Centre in Mississauga have the ability to require Operators to upstaff a vehicle if, in the opinion of the Dispatcher, additional staff is required. Dispatchers also have authority to monitor and question Driver Attendants and to report any failure to staff in accordance with Ministry standards. Further, Dispatchers are required to complete reports with respect to the absence of vital signs and must dispense first aid information. In the Private Service, the provision of first aid advice was recommended but not required.

In the determination of this application, the following provisions of the Successor Rights (Crown Transfers) Act are relevant:

"

...

1.(1) In this Act,

(f) "transfer" means a conveyance, disposition or sale;

(h) "undertaking" means a business, enterprise, institution, program, project, work or a part of any of them.



3.(1) Where an undertaking is transferred from an employer to the Crown and a bargaining agent has a collective agreement with the employer in respect of employees employed in the undertaking, the Crown is bound by the collective agreement as if a party to the collective agreement until the Tribunal declares otherwise.

4.(1) Where an undertaking was transferred from the Crown to an employer or from an employer to the Crown and an employee organization, trade union or council of trade unions was the bargaining agent in respect of employees employed in the undertaking immediately before the transfer and,

(a) a question arises as to what constitutes a unit of employees that is appropriate for collective bargaining purposes in respect of the undertaking; or

(b) any person, employee organization, trade union or council of trade unions claims that by virtue of section 2 or 3, a conflict exists as to the bargaining rights of the employee organization, trade union or council of trade unions,

any person, employee organization, trade union or council of trade unions concerned may apply to the Board, in the case of the transfer of the undertaking to an employer, or to the Tribunal, in the case of the transfer of the undertaking to the Crown, and the Board or the Tribunal, as the case requires,

(c) may determine the composition of the unit of employees referred to in clause (a);

(d) may amend, to such extent as the Tribunal or the Board considers necessary,

(i) any bargaining unit in any certificate issued to any trade union or council of trade unions,



- (ii) any bargaining unit defined in any collective agreement,
- (iii) any unit of employees determined by the Tribunal to be appropriate for collective bargaining purposes in respect of the undertaking, or
- (iv) any unit of employees that is designated by the Lieutenant Governor in Council as an appropriate bargaining unit for collective bargaining purposes in respect of the undertaking.

- (2) Where an undertaking is transferred from the Crown to an employer or from an employer to the Crown, any person, employee organization, trade union or council of trade unions may apply to the Board, in the case of the transfer of the undertaking to an employer, or to the Tribunal, in the case of the transfer of the undertaking to the Crown,
- (a) within sixty days after the transfer of the undertaking; or
  - (b) within sixty days after written notice is given by the employee organization, trade union or council of trade unions of desire to bargain to make or renew, with or without modifications, a collective agreement,

and the Board or the Tribunal, as the case requires, may terminate the bargaining rights of the employee organization, trade union or council of trade unions bound by a collective agreement in respect of employees employed in the undertaking or that has given notice, as the case may be, if in the opinion of the Board or the Tribunal the transferee of the undertaking has changed the character of the undertaking so that it is substantially different from the undertaking as it was carried on immediately before the transfer.





5.(1) Notwithstanding section 2, where an undertaking is transferred from the Crown to an employer who intermingles the employees employed in the undertaking immediately before the transfer with employees employed in one or more other undertakings carried on by the employer or an undertaking is transferred from an employer to the Crown and employees employed in the undertaking immediately before the transfer are intermingled with employees employed in other undertakings of the Crown and an employee organization, trade union or council of trade unions that is the bargaining agent in respect of employees employed in any of the undertakings applies to the Board, in the case of the transfer of the undertaking to an employer, or to the Tribunal, in the case of the transfer of the undertaking to the Crown, the Board or the Tribunal, as the case requires,

(a) may declare that the employer or the Crown, as the case may be, is no longer bound by the collective agreement referred to in section 2 or 3;

(b) may determine whether the employees concerned constitute one or more appropriate bargaining units;

(c) may declare which employee organization, trade union or council of trade unions shall be the bargaining agent in respect of each such bargaining unit; and

(d) may amend, to such extent as the Board or the Tribunal considers necessary,

(i) any certificate issued to any trade union or council of trade unions,

(ii) any bargaining unit defined in any collective agreement,

(iii) any unit of employees determined by the Tribunal to be appropriate for collective bargaining purposes in respect of any of the



- (iv) any unit of employees that is designated by the Lieutenant Governor in Council as an appropriate bargaining unit for collective bargaining purposes in respect of any of the undertakings.

As indicated at the outset, it was the initial submission of Ms. McIntosh, on behalf of the Ministry, that there was no collective agreement in effect between the Private Service and the Union when the Ministry began dispatching ambulances in Halton and Mississauga in June of 1985. In this respect, Ms. McIntosh is correct that the collective agreement expired on March 31st of that year. At the same time, the Private Service had been served with notice to bargain and for some period subsequent to March of 1985, the provisions of the Labour Relations Act would have applied to preclude a unilateral alteration of the terms and conditions of employment. In any event, there is no dispute that, at all relevant times, the Union was the bargaining agent for the Dispatchers employed by the Private Service.

It is necessary then to address the central question before the Tribunal; namely, whether an undertaking was transferred from an employer to the Crown. In this regard, the dispatching of ambulances which involves sending an ambulance in response to a telephone call is a distinct and identifiable function which was part of the business or enterprise of the Private Service. This function, we find,



constitutes an undertaking within the meaning of the Successor Rights (Crown Transfers) Act.

"Transfer" is defined in the Act as a conveyance, disposition or sale and, in determining whether an undertaking has been transferred, regard must be had to the substance of the transaction rather than simply to its form. Moreover, it has been held that a broad and liberal interpretation must be given to the Successor Rights (Crown Transfers) Act consistent with its legislative purpose: Canadian Union of Public Employees and its Local 6 v. The Corporation of the Regional Municipality of Sudbury [1981] O.L.R.B. Rep. 251 and Ontario Public Service Employees Union and The Crown in Right of Ontario, as Represented by the Ministry of Health, Woodstock Ambulance Limited and Thames Valley Ambulance Limited (February 10, 1988) File No. T/86/84.

In this case, ambulances were dispatched in the area of Halton and Mississauga by the Private Service prior to June 3, 1985 and thereafter by the Ministry. The business, then, of sending out an ambulance in response to a telephone call continued. This, however, is not determinative of whether a transfer took place as it may simply indicate that a separate and parallel undertaking was established.





It is necessary to determine, therefore, what, if anything, was "transferred" from the Private Service to the Crown. As pointed out by the Ministry, there was no transfer of the licence by which the Private Service was authorized to dispatch ambulances in Halton and Mississauga. The Ministry of Health, however, is the licencing body and does not itself require a licence to dispatch ambulances within a given area. In examining the events leading up to the Ministry's assumption of the dispatch function, we find it significant that when the Ministry could not begin its operation by the initial target date, the Private Service simply continued to dispatch ambulances as it had in the past. In addition, when technical difficulties were later experienced at the Mississauga Dispatch Centre, the facilities and equipment previously used by the Private Service were used by the Ministry and the Dispatchers hired by the Ministry from the Private Service continued to perform their duties from the Oakville location.

While we appreciate the necessity for providing uninterrupted ambulance service, at the same time, the circumstances surrounding the manner in which the dispatch function changed hands support the finding that the right to dispatch ambulances in Halton and Mississauga passed from the Private Service to the Crown. These circumstances do not suggest that a separate and parallel undertaking was established and, in our view, the Ministry cannot escape a



finding that the right to provide dispatch service was transferred simply because the Ministry itself does not require a licence for this purpose.

Although the particular equipment used by the Private Service did not find its way to the Dispatch Centre in Mississauga, in a more general sense, it may be said that the right to use equipment associated with the dispatching of ambulances passed with the dispatch function. Moreover, once again, it is significant that, albeit for a short period, the Ministry actually made use of the equipment previously used by the Private Service prior to the move to the Mississauga Dispatch Centre. In this case, there was also a transfer of managerial skills as Mr. Duffin, formerly the Dispatch Supervisor for the Private Service, continues to supervise the dispatching of ambulances for the Ministry at the Mississauga Dispatch Centre. Four of the five Dispatchers employed by the Private Service are also similarly employed by the Ministry. Further, the Ministry took over the telephone number previously used by the Private Service. In one sense, we agree with Mr. Armstrong that the use of the telephone number by the Ministry was simply an administrative convenience. This is so, of course, because the Ministry's operation and the dispatch function provided by the Private Service could not co-exist. After June 3rd, 1985, the Ministry had the exclusive right to dispatch ambulances in Halton and Mississauga.



Nevertheless, the telephone number, which was associated with the provision of ambulance service, was transferred and the Ministry assumed responsibility for any outstanding liabilities of the Private Service in connection with that number.

Although, in this case, there has been no transfer of goodwill or customer lists, in the context of a regulated monopoly, these are not particularly relevant. There was also no compensation paid by the Ministry to the Private Service for loss of the dispatch function and although this is a factor to be weighed, this alone is not decisive. The business or undertaking of dispatching ambulances in the area of Halton and Mississauga has continued and, in our view, the transfer of the right to use Ministry equipment for this purpose together with the transfer of employees, managerial skills and the telephone number of the Private Service is sufficient to find that an undertaking was transferred from the Private Service to the Crown.

In light of the conclusion we have reached, it is necessary to consider the decision of the Tribunal in Ontario Public Service Employees Union and the Crown in Right of Ontario, as represented by the Ministry of Health, Woodstock Ambulance Limited and Thames Valley Ambulance Limited, supra. That case also involved the establishment





of a Central Dispatch Centre by the Ministry from which ambulances were dispatched to an area outside of London, Ontario. As here, the Union, which represented Dispatchers of two Private Services, contended that an undertaking had been transferred from these Services to the Crown. The Tribunal, in that case, concluded that the dispatch function was an undertaking within the meaning of the Successor Rights (Crown Transfers) Act and that there had not been a fundamental change in the business or undertaking, as it was carried on in the Central Dispatch Centre. Although the majority ultimately concluded that there had not been a transfer of an undertaking within the meaning of the Act, there are a number of features which distinguish the Thames Valley decision from the circumstances of this case. Firstly, the licences which were issued by the Ministry to the Private Services in Thames Valley required those services to cease dispatching upon notice from the Ministry. In these circumstances, the majority concluded that the Private Services had a defeasible right which was subject to cancellation by the Ministry at any time. (In this case, there was no evidence of conditions being attached to the licence issue to the Private Service.) Moreover, in Thames Valley, there was no transfer of managerial skills and while some employees of the Private Services were hired by the Ministry, there was a proportionately smaller number than in this case. Finally, as distinct from this case, there was no indication in Thames Valley that the Ministry assumed



responsibility for any outstanding liabilities of the Private Services in connection with the use of the telephone number acquired from these Services by the Ministry.

In the event that we were to conclude that a transfer of an undertaking had occurred, it was the submission of Ms. McIntosh that there was a substantial change in the character of that undertaking as it was carried on immediately before the transfer. In this regard, Ms. McIntosh relied upon the differences in equipment, the differences in procedure and the differences in the responsibilities of Dispatchers at the Mississauga Dispatch Centre when contrasted with the Private Service. Ms. McIntosh also contended that the larger area serviced by the Mississauga Dispatch Centre has fundamentally altered the character of the undertaking.

There can be no doubt that more sophisticated equipment is in use at the Mississauga Dispatch Centre than was used in the Private Service and the Dispatchers have some additional responsibilities. Nevertheless, we agree with Mr. Paliare, on behalf of the Union, that the Mississauga Dispatch Centre performs the same essential function as did the Private Service and the changes relied upon by the Ministry are not sufficient to find that the undertaking is substantially different from that which was carried on immediately prior to the transfer. In our view,



the increase in the size of the geographic area serviced, also does not materially affect the nature of the undertaking. This latter feature, however, requires the Tribunal to consider the matter from another perspective.


The Dispatch Centre in Mississauga was operational prior to June 3, 1985 and Halton and Mississauga were merely accretions to the larger area serviced by that Centre. In addition, as noted at the outset, there are eleven such Centres throughout the province. In this case, after some period of orientation, Dispatchers from the Private Service began to dispatch ambulances in areas other than Halton and Mississauga and the merged enterprise is operated as one unit. In these circumstances, there has been an intermingling of employees formerly employed by the Private Service with employees of the Crown. Either by virtue of this intermingling or by virtue of the Section 4(1) of the Successor Rights (Crown Transfers) Act, it is appropriate to consider what constitutes a unit of employees that is appropriate for collective bargaining. In this case, the Ontario Public Service Employees Union was the bargaining agent for the Dispatchers employed by the Private Service and is also the bargaining agent for all employees of the Ministry. In our view, it would be unreasonable to require the Ministry to bargain separately with the Union in respect of the Dispatchers who were formerly employees of the Private Service and undue fragmentation would occur if a separate and distinct bargaining unit were maintained.

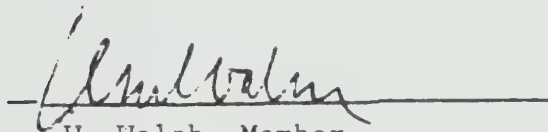


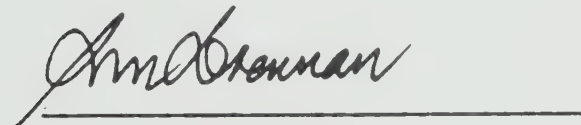


In all the circumstances, we conclude that an undertaking was transferred from the Private Service to the Crown and Dispatchers employed by the Private Service shall be included in the all employee bargaining unit represented by the Union. We shall remain seized for purposes of the implementation of this decision and to deal with the matter of consequential relief in the event that this becomes necessary.

DATED AT TORONTO this 15th day of August , 1988.

  
J.H. Devlin, Vice Chairman

  
W. Walsh, Member

  
R. Drennan, Member









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T/0008/85-2

180 Dundas Street West, Suite 2100, Toronto, Ontario M5G 1Z8  
180, rue Dundas ouest, Bureau 2100, Toronto (Ontario) M5G 1Z8

Telephone/Téléphone: 416/326-1388  
Facsimile/Télex : 416/326-1396

The Successor Rights (Crown Transfers) Act, R.S.O. 1980, C. 489

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

T/0008/85

Between:

Ontario Public Service Employees Union

Applicant

- and -

The Crown in Right of Ontario, as represented  
by the Ministry of Health, District of Halton and Mississauga  
Ambulance Service Ltd. and Emergency Health Services,  
Central Ambulance Dispatch Centre

Respondents

Before:

J.H. Devlin, Vice Chairperson  
P.J. O'Keefe, Member  
C.L. Boettcher, Member

For the Applicant:

C. Paliare  
Richard P. Stephenson  
Counsel  
Gowling, Strathy & Henderson

For the Respondents:

L. McIntosh  
Counsel  
Crown Law Office, Civil  
Ministry of the Attorney General

Hearing:

April 8, 1992

Written submissions received on April 9, 1992, April 21, 1992,  
May 6, 1992, May 25, 1992 and June 25, 1992



On August 15, 1988, the Tribunal rendered a decision in which it determined that the dispatching of ambulances in Halton and Mississauga was an undertaking which was transferred from the District of Halton and Mississauga Ambulance Service Ltd. ("the Ambulance Service") to the Crown effective June 3, 1985. The Tribunal further found that subsequent to the transfer, there was an intermingling of employees formerly employed by the Ambulance Service with employees of the Crown. Given this intermingling and given that the Union was the bargaining agent both for Dispatchers employed by the Ambulance Service and for employees of the Ministry, the Tribunal was of the view that it would be unreasonable to require the Crown to bargain separately in respect of the Dispatchers employed by the Ambulance Service. The Tribunal was also of the view that undue fragmentation would occur if a separate and distinct bargaining unit were to be maintained. In the result, the Tribunal held that the Dispatchers employed by the Ambulance Service were to be included in the all-employee bargaining unit represented by the Union.

Subsequently, in May of 1991, the parties requested that the hearing be reconvened to deal with certain issues relating to the implementation of the Tribunal's earlier decision. The first issue to be determined is whether the Ministry was bound either by the terms of the collective agreement between the Ambulance Service and the Union covering

the period from April 1, 1984 to March 31, 1985 or by any subsequent agreement in effect prior to the date of the Tribunal's decision in August of 1988. The second issue concerns the status of Ken Rees and Noel O'Connor, both of whom worked as Dispatchers for the Ambulance Service. Mr. Rees was not offered employment with the Ministry and while Mr. O'Connor did work for the Ministry as a Dispatcher, he was released from employment in October of 1985.

For purposes of dealing with these issues, the parties provided the Tribunal with an Agreed Statement of Fact which is follows:

1. In a letter dated January 7, 1985, the Union gave notice of its desire to bargain the collective agreement between the District of Halton and Mississauga Ambulance Service Ltd. ("the Ambulance Service") which expired on March 31, 1985. A copy of the letter dated January 7, 1985 is attached as Schedule A.
2. There was no collective agreement between the Union and the Ambulance Service on June 3, 1985.
3. The next collective agreement between the Union and the Ambulance Service was signed on January 1, 1986. The term of the collective agreement was from April 1, 1985 to March 31, 1986.
4. Prior to June 3, 1985, five persons were employed by the Ambulance Service as dispatchers. They were Ken Rees, George Salter, Noel O'Connor, Jan Ingham and Gary Stark. All five were full-time employees with long years of service.
5. On October 15, 1984, the Ministry of Health ("the Ministry") posted the job of Ambulance Dispatcher with C.A.D.S. Mississauga. The job posting is attached as Schedule B.

6. George Salter, Noel O'Connor, Jan Ingham and Gary Stark were offered employment with the Ministry. The hourly rates which they were offered were less than those set out in the collective agreements between the Union and the Ambulance Service.
7. The rates of pay offered to the employees were set out in the collective agreement between OPSEU and the Ministry in effect at that time for positions classified as Radio Operator 2. The collective agreements between the parties from time to time have not made any special provision with respect to the rates of pay for these four employees.
8. Mr. Rees applied for a job on October 17, 1984, without prejudice to any rights he had under the collective agreements between the Union and the Ambulance Service.
9. Mr. Rees worked as a driver/attendant with the Ambulance Service from February of 1975 to June of 1983. In June of 1983, he began to receive worker's compensation as a result of a job-related injury. On or about June of 1984, Mr. Rees returned to work as a dispatcher with the Ambulance Service.
10. In a letter dated January 9, 1985, Diane Cullen, (then) the Manager of C.A.D.S., advised Mr. Rees that he was unsuccessful in the competition. A copy of the letter of January 9, 1985 is attached as Schedule C.
11. In a letter dated May 2, 1985, the Ambulance Service advised Mr. Rees that his position would be terminated effective June 3, 1985. A copy of the letter dated May 2, 1985 is attached as Schedule D.
12. At the same time, the Ambulance Service advised the Worker's Compensation Board that the dispatch job was no longer available to Mr. Rees and requested that his payments be reinstated. Mr. Rees continued to be in receipt of worker's compensation benefits until in or about December 31, 1986.
13. Mr. O'Connor was appointed to the public service effective on or about June 3, 1985.
14. The Ministry of Health ("the Ministry") advised Mr. O'Connor that he was being released from employment pursuant to s.22(5) of the Public Service Act on or about October 30, 1985.
15. Mr. O'Connor filed a grievance with the Crown Employees Grievance Settlement Board claiming that he had been



dismissed without cause. The Board held a hearing on June 6, 1986. Neither party took the position that Mr. O'Connor was not in the first year of his employment in the public service. In a decision dated May 25, 1988, the Board held that Mr. O'Connor had been released and had not been dismissed. A copy of the decision of the Board is attached as Schedule E.

It was the submission of Mr. Paliare, on behalf of the Union, that as a successor employer, the Ministry was bound by the terms of the collective agreements between the Ambulance Service and the Union which were in effect from the date of the transfer to the date of the Tribunal's decision in August of 1988. While it was conceded that no collective agreement in effect on June 3, 1985, which was the date of the transfer, Mr. Paliare pointed out that the Union previously served notice to bargain on the Ambulance Service. As a result of that notice, the freeze provisions of the Labour Relations Act precluded the Ambulance Service from altering the terms and conditions of employment. Upon the transfer, the freeze provisions of the Crown Employees Collective Bargaining Act preserved the existing terms and conditions of employment until a collective agreement was executed between the Ambulance Service and the Union in January of 1986. Mr. Paliare pointed out that this agreement was retroactive to April 1, 1985 which was prior to the effective date of the transfer.

In the result, Mr. Paliare requested that from the date of the transfer to the date of the Tribunal's decision,

Dispatchers previously employed by the Ambulance Service be paid the difference between the wage rates to which they were entitled under the collective agreements between the Ambulance Service and the Union and the Ministry rates for Radio Operators 2 which were paid subsequent to June 3, 1985.

With respect to the status of individual employees, Mr Paliare submitted that Mr. Rees acquired seniority with the Ambulance Service and it was not open to the Ministry, as a successor employer, to decline to employ him as a Dispatcher. According to Mr. Paliare, Mr. Rees was the most senior Dispatcher employed by the Ambulance Service and could be discharged only for just cause or otherwise dealt with a manner consistent with the terms of the collective agreements between the Ambulance Service and the Union. In the result, Mr. Paliare requested that Mr. Rees be reinstated to employment as a Dispatcher and compensated for all earnings lost from June 3, 1985 to the date of reinstatement, together with interest.

In respect of Mr. O'Connor, it was the position of the Union that as he, too, acquired seniority with the Ambulance Service, he was subject to discharge from employment with the Ministry only for just cause. Although the Grievance Settlement Board characterized Mr. O'Connor's termination in October of 1985 as a release during the first year of his employment as provided in section 22(5) of the Public Service Act, Mr. Paliare submitted

that as early as September of 1984, the Union put the Ministry on notice of its position that the Successor Rights (Crown Transfers) Act governed the transfer of the dispatch function from the Ambulance Service to the Crown. By virtue of that Act, Mr. Paliare contended that it was not open to the Ministry to treat Mr. O'Connor as a probationary employee. Accordingly, Mr. Paliare requested that Mr. O'Connor be reinstated to employment with full compensation from the date of termination to the date of reinstatement, together with interest.

It was the submission of Ms. McIntosh, on behalf of the Ministry, that the Ministry was not bound by the terms of any collective agreement between the Ambulance Service and the Union. In this regard, Ms. McIntosh pointed out that there was no agreement in effect on June 3, 1985 which was the date of the transfer and although the freeze provisions of the Labour Relations Act may have precluded the Ambulance Service from altering the terms and conditions of employment prior to that date, it was submitted that these provisions did not have the effect of extending the collective agreement which expired on March 31, 1985. In any event, Ms. McIntosh contended that the freeze provisions are not binding on a successor employer and, in particular, are not binding on the Crown. Accordingly, although the Union retained its status as bargaining agent at the date of the transfer and was entitled to serve written notice to bargain on the Crown, Ms. McIntosh pointed out no such notice was served



in this case. The Ministry, therefore, was free to alter the terms and conditions of employment previously in effect.

As to Mr. Rees, Ms. McIntosh contended that as there was no collective agreement in effect on the date of the transfer, the Ministry was not bound to recognize the seniority of employees formerly employed by the Ambulance Service. Accordingly, the Ministry was not required to offer employment to Mr. Rees and Ms. McIntosh suggested that, in fact, subsequent to June 3, 1985, Mr. Rees continued to be an employee of the Ambulance Service for purposes of receiving Workers' Compensation benefits. In the alternative, Ms. McIntosh contended that evidence introduced during the initial hearing in this matter indicated that Mr. Rees' performance as a Dispatcher was unsatisfactory and that if it became necessary, the Ministry would tender further evidence to substantiate this claim. In the final alternative, it was submitted that Mr. Rees was not entitled to employment as a Dispatcher with the Ministry as he was classified as a Driver/Attendant with the Ambulance Service and performed dispatch work only as a light duty assignment.

With respect to Mr. O'Connor, Ms. McIntosh reiterated her submission that there was no collective agreement in effect on the date of the transfer with the result that the Ministry was not required to recognize Mr. O'Connor's seniority with the Ambulance Service. In any event, McIntosh submitted that Mr.

O'Connor's seniority could not prevail in the face of section 22(5) of the Public Service Act which provides for the release of a public servant during the first year of his employment for failure to meet the requirements of his position. Moreover, it was contended that the matter of Mr. O'Connor's status was dealt with by Grievance Settlement Board and, during those proceedings, the Union did not take issue with the fact that Mr. O'Connor was in the first year of his employment with the Ministry. In the result, Ms. McIntosh submitted that it would not be appropriate for the Tribunal to grant any relief to Mr. O'Connor.

The following provisions of the Successor Rights (Crown Transfers) Act, the Crown Employees Collective Bargaining Act and the Labour Relations Act are relevant to the issues raised by the parties:

Successor Rights (Crown Transfers) Act

3.(1) Where an undertaking is transferred from an employer to the Crown and a bargaining agent has a collective agreement with the employer in respect of employees employed in the undertaking, the Crown is bound by the collective agreement as if a party to the collective agreement until the Tribunal declares otherwise.

. . . .

(3) Where an undertaking is transferred from an employer to the Crown and a trade union or council of trade unions has been certified by the Board as bargaining agent or has given or is entitled to give written notice of desire to bargain to make or renew a collective agreement in respect of employees employed in the undertaking, the bargaining agent continues, until the Tribunal declares otherwise, to be the bargaining agent in respect of the employees and is entitled to give to the body representing the Crown or to the Crown, as the case requires, written notice of desire to bargain to

make or renew, with or without modifications, a collective agreement, as the case requires.

. . .

10. For the purposes of the Crown Employees Collective Bargaining Act and the Labour Relations Act, notice given under this Act of desire to bargain to make or renew, with or without modifications, a collective agreement or a declaration by the Board of the Tribunal that an employee organization, trade union or council of trade unions is the bargaining agent in respect of the employees in a bargaining unit has the same effect as the granting of representation rights or certification as bargaining agent.

. . .

#### Crown Employees Collective Bargaining Act

8.(1) Upon being granted representation rights under section 4, the employee organization may give the employer written notice of its desire to bargain with the view to making a collective agreement.

. . .

22.(2) Either party to a collective agreement desiring to bargain with a view to renewal, with or without modifications, of the agreement then in operation or the making of a new agreement, may, only during the period between ninetieth and the one hundred and twentieth days prior to the termination of the agreement, give notice in writing thereof to the other party accompanied by a statement in writing of its proposed modifications, if any.

. . .

23.(1) Where notice has been given by the employee organization under section 8, the conditions then in effect applicable to or binding upon the employer, the employee organization or the employees which are subject to collective bargaining within the meaning of this Act shall not be altered without the consent of the employer, the employee organization or the employees, as the case may be.

(2) Where notice has been given by either party to a collective agreement under section 22, except as altered by an agreement in writing of the parties, the terms and provisions of the agreement then in operation shall continue to operate until a new agreement entered into pursuant to the provisions of this Act is in operation.

. . .



Labour Relations Act

53(1) Either party to a collective agreement may, within the period of ninety days before the agreement ceases to operate, give notice in writing to the other party of its desire to bargain with a view to the renewal, with or without modifications, of the agreement then in operation or to the making of a new agreement.

53(2) A notice given by a party to a collective agreement in accordance with provisions in the agreement relating to its termination or renewal shall be deemed to comply with subsection (1).

. . .

79(1) Where notice has been given under section 14 or section 53 and no collective agreement is in operation, no employer shall, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty, of the employer, the trade union or the employees, and no trade union shall, except with the consent of the employer, alter any term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees,

- (a) until the Minister has appointed a conciliation officer or a mediator under this Act, and,
  - (i) seven days have elapsed after the Minister has released to the parties the report of a conciliation board or mediator or,
  - (ii) fourteen days have elapsed after the Minister has released to the parties a notice that he does not consider it advisable to appoint a conciliation board,

as the case may be; or

- (b) until the right of the trade union to represent the employees has been terminated,

whichever occurs first.

. . .

The nature of the collective bargaining obligations which may be acquired by a successor employer under the Successor Rights (Crown Transfers) Act are set out in sections 2 and 3 of

the Act. In this regard, section 3(1) provides that where an undertaking is transferred from an employer to the Crown and there is a collective agreement in respect of the employees employed in the undertaking, the Crown is bound by the collective agreement as if a party to the agreement, until the Tribunal declares otherwise. Section 3(3) then provides that where an undertaking is transferred from an employer to the Crown and a union has been certified as bargaining agent or has given or is entitled to give written notice to bargain to make or renew a collective agreement in respect of employees employed in the undertaking, the bargaining agent continues, until the Tribunal declares otherwise, to be the bargaining agent and is entitled to give the body representing the Crown written notice to bargain to make or renew a collective agreement.

As indicated previously, in this case, the transfer of the undertaking from the Ambulance Service to the Crown took place on June 3, 1985 and it is this date which is relevant for purposes of determining the collective bargaining obligations acquired by the Ministry: see Owen Sound General and Marine Hospital v. Ontario Public Service Employees Union et al., Canadian Union of Public Employees Local 48 v. Owen Sound General and Marine Hospital v. Ontario Public Service Employees Union v. Ontario Nurses' Association [1978] OLRB Rep. Aug 759.

In this regard, the parties were agreed that the prior collective agreement between the Ambulance Service and the Union expired on March 31, 1985 and there was no collective agreement in effect on June 3, 1985. Although an agreement was subsequently executed which retroactive to April 1, 1985, under similar legislative provisions, the Ontario Labour Relations Board found that a subsequent agreement, although retroactive to a date prior to the transfer, was not binding on the successor employer as the obligations contained in that agreement did not exist at the date of the transfer and, therefore, could not pass at that time: see Owen Sound General and Marine Hospital (supra). In a similar vein, the agreement between the Ambulance Service and the Union which was made retroactive to April 1, 1985 was not in existence on the date of the transfer and, accordingly, could not pass to the Ministry at that time.

Nevertheless, the Union submitted that in view of the notice to bargain served on the Ambulance Service in January of 1985, the terms and conditions of employment contained in the prior agreement which expired on March 31, 1985 continued in effect. In this regard, the Union relied on the freeze provisions in section 79(1) of the Labour Relations Act which preclude the alteration of terms and conditions of employment following the giving of notice to bargain. Section 79(1), however, applies where "there is no collective agreement in operation" and, accordingly, does not extend the life of the



agreement: see Re 380611 Ontario Ltd. (Colonial Tavern) and International Beverage Dispensers' and Bartenders' Union, Local 280 (1979), 23 L.A.C.(2d) 150 (Adams). In the result, as there was no collective agreement in effect on June 3, 1985, which was the date of the transfer, section 3(1) of the Successor Rights (Crown Transfers) Act has no application.

Turning then to section 3(3) of the Act, as indicated above, in this case, the Union served notice to bargain on the Ambulance Service in January of 1985. The effect of notice to bargain given to a predecessor employer and the application of the freeze provisions to a successor employer were considered by the Ontario Labour Relations Board in Christian Labour Association of Canada v. Oxford Manor Rest Home [1980] OLRB Rep. Dec 1786. In that case, the Union claimed that a freeze of the terms and conditions of employment resulting from a notice to bargain given to the predecessor employer was binding on the successor employer following a sale of the business. The Board rejected the Union's claim, however, and determined that the freeze did not survive the sale of the business. Instead, any freeze of the conditions of employment binding the successor employer was found to originate entirely with the notice to bargain given to the successor employer and extended only to conditions which existed at that date. In this regard, the Board commented as follows:

In essence, the trade union, such as in the instant case, continues "to be the bargaining agent for the employees of the person to which the business was sold" and "is entitled to give to the person to whom the business was sold a written notice of its desire to bargain with a view to making a collective agreement". Nothing in the section explicitly puts the new employer into the shoes of the previous employer so as to make all the rights and obligations relating to the collective bargaining relationship automatically attach to the new employer. The fact that the Legislature has specifically set out that the trade union shall continue to be the bargaining agent and shall have the right to serve notice to bargain on the new employer, militates against there being any additional rights or privileges from any other notice to bargain which may have been served on the previous employer. This view is further fortified by an examination of section 55(2) [now s. 63(2)] which, in dealing with a sale of a business while an application for certification or termination is before the Board provides, "... person to whom the business has been sold is ... the employer for purposes of the application as if he were named as the employer in the application". In this latter case where the Legislature intended that the new employer should fit precisely into the shoes of the previous employer it has explicitly said so. Had the Legislature similarly intended in section 55(3) [now s. 63(3)] we have no doubt it would have said so.

Similarly, in Corporation of the County of Simcoe (Trillium Manor Home for the Aged) v. Ontario Nurses' Association [1990] OLRB Rep. April 472, the Board found that section 63 of the Labour Relations Act does not preserve all rights of employees and their trade union which exist at the time of sale. When a sale occurs after certification and before a collective agreement is executed, the union has the right to serve notice to bargain on the successor employer and that notice has the same effect as certification under section 7 of the Act. The union and the successor are then free to engage in collective bargaining and to utilize the dispute resolution mechanisms available which would

include the appointment of a conciliation officer and a board of arbitration, if necessary. In view of this scheme, the Board found that an arbitration board constituted by the predecessor employer and the Union under the Hospital Labour Disputes Arbitration Act did not have jurisdiction subsequent to the sale of the business.

Like section 63(3) of the Labour Relations Act, section 3(3) of the Successor Rights (Crown Transfers) Act provides that where an undertaking is transferred from an employer to the Crown and the Union has given written notice to bargain with respect to the renewal of the collective agreement, the Union retains its status as bargaining agent and is entitled to give written notice to bargain to the Crown. The section, however, does not provide, as do other sections of the Act, that the Crown stands in the shoes of the predecessor employer. Accordingly, the Tribunal finds that a notice to bargain given to a predecessor employer is not binding upon the Crown as a successor employer. In this case, therefore, the freeze which was in effect prior to June 3, 1985 did not survive the transfer.

In the result, a freeze of the conditions of employment binding upon the Crown must result from written notice to bargain given to the Crown in accordance with section 3(3) of the Successor Rights (Crown Transfers) Act. In this regard, section 10 of the Act provides that for purposes of the Crown Employees



Collective Bargaining Act, notice of a desire to bargain given under the Successor Rights (Crown Transfers) Act has the same effect as the granting of representation rights or certification as bargaining agent. Under section 8 of the Crown Employees Collective Bargaining Act, the granting of representation rights entitles the union to give the employer written notice to bargain and the giving of notice in accordance with that section precludes the alteration of the conditions of employment then in effect.

In this case, it was the submission of the Union that its conduct amounted to constructive notice to bargain and that this fulfilled the requirements of section 3(3) of the Successor Rights (Crown Transfers) Act. In support of its position, the Union relied on Owen Sound General and Marine Hospital (supra) which was a case involving the transfer of a psychiatric hospital, previously owned and operated by the Crown, to a public general hospital incorporated under provincial jurisdiction and governed by a board of directors. At the time of the transfer, the Crown was a party to a number of collective agreements which were found to be binding on the public hospital until the Ontario Labour Relations Board declared otherwise in accordance with section 2(1) of the Successor Rights (Crown Transfers) Act. At the time of the transfer, the Crown was also bargaining with respect to the renewal of three collective agreements and, as indicated previously, the Board determined that the successor

employer was not bound by collective agreements which came into effect subsequent to the date of the transfer although they were made retroactive to a date prior to the transfer. The Board also determined that, in accordance with section 2(3) of the Act, the Union was entitled to give written notice to bargain to the general hospital and that its conduct amounted to constructive notice to bargain upon the transfer of the undertaking. By operation of section 10 of the Successor Rights (Crown Transfers) Act and section 10 of the Hospital Labour Disputes Arbitration Act, the notice to bargain had the effect of freezing the existing terms and conditions of employment. In this regard, the Board commented as follows:

... By operation of section 2(3) of the Successor Rights (Crown Transfers) Act, 1977, OPSEU was entitled to give to the general hospital written notice of its desire to bargain the three agreements it was then re-negotiating with the Crown. It is clear from the evidence that at no time did OPSEU relinquish its claim to these bargaining rights. In these circumstances, therefore, the Board is prepared to find that OPSEU's conduct amounted to constructive notice to bargain upon the transfer of the undertaking. This notice, by operation of section 10 of the Successor Rights (Crown Transfers Act, 1977, would have the same effect as the granting of representation rights or certification as bargaining agent, and would invoke subsection (1) of section 10 of the Hospital Labour Disputes Arbitration Act, R.S.O. 1970. c. 208. as amended, freezing the established pattern of the employment relationships of the persons falling within the OPSEU bargaining unit. This freeze would apply from the date of the transfer of the undertaking until this decision of the Board establishing bargaining rights for the new bargaining structure.

It was the position of the Ministry, however, that the concept of constructive notice has no application given the

requirement for written notice to bargain in sections 2(3) and 3(3) of the Successor Rights (Crown Transfers) Act. Although Ms. McIntosh further submitted that in Owen Sound General and Marine Hospital case, the Board's attention was not drawn to this requirement, we cannot accept this submission. In the passage set out above, the Board makes explicit reference to the requirement for written notice to bargain under section 2(3) of the Act. Nevertheless, Ms. McIntosh contended that the Owen Sound General and Marine Hospital case is distinguishable on the ground that, in that case, there was an agreement between the Ministry of Health and the general hospital dealing specifically with employees covered by successor rights legislation. Although Ms. McIntosh contended that this agreement may have influenced the Board's decision to apply the concept of constructive notice, it is difficult to see how an agreement between a predecessor employer and a successor employer could have a bearing on whether or not the conduct of the Union constituted constructive notice to bargain.

In any event, given the conclusion reached in the Owen Sound General and Marine Hospital case, the Tribunal is not prepared to rule out the application of constructive notice to the provisions of section 3(3) of the Successor Rights (Crown Transfers) Act. The Tribunal also notes that in Re 380611 Ontario Ltd. (Colonial Tavern) and International Beverage Dispensers' and Bartenders' Union, Local 280 (supra), the Board



determined that constructive notice may apply to the provisions of section 55(3) [now s. 66(3)] of the Labour Relations Act which is similar in all material respects to section 3(3) of the Successor Rights (Crown Transfers) Act.

Whether or not the concept of constructive notice applies in any given case is a matter to be determined on the evidence. In this case, as constructive notice was first dealt with in written submissions which were forwarded to the Tribunal following the hearing, the Tribunal is not satisfied that the parties have fully addressed this issue. Accordingly, the Tribunal directs that the hearing be reconvened to address the application of constructive notice in the circumstances of this particular case. The hearing shall reconvene on a date to be fixed by the Registrar.

DATED AT TORONTO, this 3rd day of November, 1992.

  
\_\_\_\_\_  
Vice Chairperson

"P.J. O'Keefe"  
Member

"C.L. Boettcher"  
Member







Ontario Public Service  
Labour  
Relations  
Tribunal

Fonction publique de l'Ontario  
Tribunal administratif  
des relations  
de travail

T/0008/85-3

180 Dundas Street West, Suite 2100, Toronto, Ontario M5G 1Z8  
180, rue Dundas ouest, Bureau 2100, Toronto (Ontario) M5G 1Z8

Telephone/Téléphone: 416/326-1388  
Facsimile/Télex : 416/326-1396

The Successor Rights (Crown Transfers) Act, R.S.O. 1980, C. 489

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

T/0008/85

Between:

Ontario Public Service Employees Union

Applicant

- and -

The Crown in Right of Ontario, as represented  
by the Ministry of Health, District of Halton and Mississauga  
Ambulance Service Ltd. and Emergency Health Services,  
Central Ambulance Dispatch

Respondents

Before:

J.H. Devlin, Vice Chairperson  
P.J. O'Keefe, Member  
C.L. Boettcher, Member

For the Applicant:

C. Paliare  
Counsel  
Gowling, Strathy & Henderson

For the Respondents:

L. McIntosh  
Counsel  
Crown Law Office, Civil  
Ministry of the Attorney General

Hearing:

June 21, 1993

On August 15, 1988, the Tribunal rendered a decision in which it determined that the dispatching of ambulances in Halton and Mississauga was an undertaking which was transferred from the District of Halton and Mississauga Ambulance Service Ltd. ("the Ambulance Service") to the Crown effective June 3, 1985. The Tribunal further found that subsequent to the transfer, there was an intermingling of employees formerly employed by the Ambulance Service with employees of the Crown. Given this intermingling and given that the Union was the bargaining agent both for dispatchers employed by the Ambulance Service and for employees of the Ministry, the Tribunal was of the view that it would be unreasonable to require the Crown to bargain separately in respect of the dispatchers employed by the Ambulance Service. The Tribunal was also of the view that undue fragmentation would occur if a separate and distinct bargaining unit were to be maintained. In the result, the Tribunal held that the dispatchers employed by the Ambulance Service were to be included in the all-employee bargaining unit represented by the Union.

Subsequently, in April of 1992, the hearing was reconvened at the request of the parties to deal with certain remedial issues. Following that hearing and the receipt of written submissions by the parties, the Tribunal rendered a further decision dated November 3, 1992. In that decision, the



Tribunal held that as there was no collective agreement in effect on June 3, 1985, which was the date of the transfer of the undertaking, the matter was governed by section 3(3) of the Successor Rights (Crown Transfers) Act. That section provides that where an undertaking is transferred from an employer to the Crown and a Union has been certified as bargaining agent or has given or is entitled to give written notice to bargain to make or renew a collective agreement in respect of employees employed in the undertaking, the Union retains its status as bargaining agent, until the Tribunal declares otherwise and is entitled to give written notice to bargain to the Crown. Section 10 of the Act then provides that for purposes of the Crown Employees Collective Bargaining Act, notice to bargain given under the Successor Rights (Crown Transfers) Act has the same effect as the granting of representation rights or certification as bargaining agent. Under section 8 of the Crown Employees Collective Bargaining Act, the granting of representation rights entitles the Union to give the Employer written notice to bargain and the giving of notice in accordance with that section precludes the alteration of the conditions of employment then in effect.

Based upon these provisions, the Tribunal determined that a freeze of the conditions of employment must result from the giving of written notice to bargain as provided above. Moreover, based upon the decision of the Ontario Labour Relations Board in Owen Sound General and Marine Hospital v. Ontario Public



Service Employees Union et. al., Canadian Union of Public Employees Union Local 48 v. Owen Sound General and Marine Hospital v. Ontario Public Service Employees Union v. Ontario Nurses Association [1978] OLRB Rep. Aug 759, the Tribunal indicated that it was not prepared to rule out the application of the concept of constructive notice to the requirements of section 3(3) of the Successor Rights (Crown Transfers) Act.

Nevertheless, as constructive notice was first raised in written submissions which were forwarded to the Tribunal following the hearing, the Tribunal was not satisfied that the parties had fully addressed this issue.

As a result, the hearing was reconvened on June 21, 1993 to address the application of constructive notice in the circumstances of this case. In this regard, the evidence indicates that on September 27, 1984, Jacqueline Gardner, a Staff Representative with the Union, wrote a letter to Fred Rusk, a Regional Manager with the Ministry of Health, which was as follows:

"September 27, 1984

. . .

Dear Mr. Rusk:

Re: CADS Mississauga

I am writing to you on behalf of the dispatchers who work for Halton-Mississauga Ambulance in Oakville, Ontario. These employees are covered by a collective agreement between the employer and the Ontario Public Service Employees Union and its Local 207.

It has come to my attention that the Ministry of Health intends to take over the positions of dispatcher at Halton-Mississauga and transfer these position to the Ministry of Health. If this is accurate information, I would advise you of the necessity to negotiate the terms and conditions of the transfer of these employees to your jurisdiction.

At the outset, let me assure you it is our position that these employees would be covered under the Successor Rights (Crown Transfers) Act and as such would carry over all such provisions of the current collective agreement between OPSEU and the Halton-Mississauga Ambulance Ltd.,

I look forward to your reply and advise that I can be reached by phone if necessary at the following numbers: 1-800-263-8827 or 525-5527.

Yours truly,

Jacqueline Gardner'  
Jacqueline Gardner  
Staff Representative  
Hamilton Regional Office

. . .

There would appear to be no dispute that the collective agreement between the Ambulance Service and the Union referred to in Ms. Gardner's letter covered the period from April 1, 1984 to March 31, 1985. There would also appear to be no dispute that when the letter of September 27, 1984 was written, it was anticipated that the transfer of the dispatch function would take place at an earlier date but that for reasons set out in the Tribunal's decision of August 1988, the transfer did not occur until June 3, 1985.

In any event, on a number of occasions subsequent to September 27, 1984, Ms. Gardner telephoned both Mr. Rusk and Richard Armstrong, also a Regional Manager with the Ministry, and

proposed that the parties endeavour to reach an agreement with respect to the terms and conditions applicable to the transfer of employees from the Ambulance Service to the Crown. The Ministry, however, indicated an unwillingness to enter into discussions with the Union and, in fact, it does not appear that the Ministry responded to Ms. Gardner's letter of September 27, 1984. Moreover, as early as October of 1984, the Ministry posted vacancies for dispatchers to work at its centre in Mississauga which was to begin operations in the Halton, Mississauga area when the Ministry took over the dispatch function from the Ambulance Service.

Finally, the evidence indicates that in the application filed with the Tribunal, which is dated June 13, 1985, the Union took the position that the dispatch function involved an undertaking which had been transferred from the Ambulance Service to the Crown and that the Crown was bound by the terms of the collective agreement between the Ambulance Service and the Union. In its reply to the application, the Ministry took the position that no transfer had occurred but that, in the alternative, the character of the undertaking had changed so as to be substantially different from the undertaking as it was carried on immediately prior to the transfer.

Based upon these facts, it was the submission of Mr. Paliare that the Union engaged in a course of conduct over the

months preceding the transfer and in the period immediately following the transfer which amounted to constructive notice to bargain. This notice, it was contended, resulted in a freeze of the existing conditions of employment which remained in effect until the date of the Tribunal's decision in August of 1988.

Once again, it was the submission of Ms. McIntosh that the concept of constructive notice has no application to the requirement for written notice to bargain. It was further contended that the Union was required to give written notice to bargain under both the Successor Rights (Crown Transfers) Act and the Crown Employees Collective Bargaining Act. Moreover, Ms. McIntosh submitted that even if the letter of September 27, 1984 could constitute written notice to bargain, it did not clearly refer to bargaining with respect to the renewal of the collective agreement. Furthermore, it pre-dated the transfer by a considerable number of months and, accordingly, was premature. The Union's application, on the other hand, post-dated the transfer and was too late to revive the conditions of employment in effect immediately prior to the transfer. In the result, Ms. McIntosh asked the Tribunal to conclude that the Ministry was not bound by the terms and conditions of employment in effect between the Ambulance Service and the Union.

As indicated in the Tribunal's decision of November 3, 1992, the concept of constructive notice has been applied by the



Ontario Labour Relations Board to provisions which are virtually identical to section 3(3) of the Successor Rights (Crown Transfers) Act which is similar, in turn, to section 8 of the Crown Employees Collective Bargaining Act. On this basis, the Tribunal is not prepared to rule out the application of the concept in this case. Moreover, in the Tribunal's view, regard must be had to the substance of what occurred and an interpretation adopted which is consistent with the purpose of the legislative provisions in issue.

As to the Union's conduct in this case, the evidence indicates that in September of 1984, the Union wrote to the Ministry expressing its view that, upon the transfer of the dispatch function, the Ministry would be bound by the collective agreement between the Ambulance Service and the Union. The Union further proposed that the parties enter into negotiations with respect to the terms and conditions which would apply to the employees affected by the transfer. While the letter was admittedly written some months before the transfer occurred, there is authority to suggest that an "early" notice to bargain can be cured by the passage of time: see Re United Headwear, Optical and Allied Workers Union of Canada, Local 3 et al. and Biltmore/Stetson (Canada) Inc. et al. (1983) 43 O.R.(2d) 243 (Ont C.A.). Moreover, in this case, there was no suggestion that the letter was withdrawn and, in fact, Ms. Gardner continued to

pursue an agreement with Ministry representatives until the date of the transfer.

In any event, in the Tribunal's view, it is clear that in the period preceding and immediately following the transfer, the Union engaged in a course of conduct which could have left the Ministry in no doubt as to its desire to exercise its bargaining rights in relation to employees of the Ambulance Service. The Ministry, on the other hand, was evidently not prepared to enter into discussions with the Union. Moreover, even when it was anticipated that the transfer would take place during the currency of the collective agreement between the Ambulance Service and the Union, the Ministry was content to proceed on the basis that its actions would not involve the transfer of an undertaking and that it had no obligation to employees of the Ambulance Service. In fact, as of October 1984, the Ministry began to post vacancies for the position of dispatcher at its dispatch centre in Mississauga.

In the result, the Tribunal finds that the Union engaged in a course of conduct which amounted to constructive, if not actual, notice to bargain so as to satisfy the requirements of both the Successor Rights (Crown Transfers) Act and the Crown Employees Collective Bargaining Act. Accordingly, this resulted in a freeze of the conditions of the employment in effect immediately prior to the transfer which conditions were binding

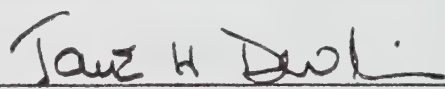


on the Ministry upon the transfer of the undertaking. As requested by the Union, the Tribunal further finds that these conditions remained in effect until the date of the Tribunal's decision in August of 1988.

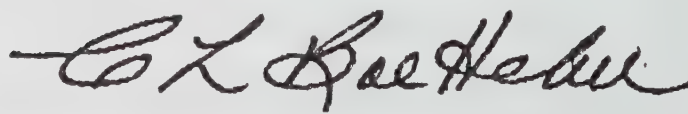
In view of this decision, the Tribunal urges the parties to endeavour to resolve any outstanding issues relating to Messrs. Rees and O'Connor. In the event that they are unable to do so, however, at the request of either party, the Tribunal shall render its decision with respect to the status of these individuals.

The Tribunal shall remain seized for purposes of implementation of its decision.

DATED AT TORONTO, this 24th day of August, 1993.

  
J. Devlin, Vice-Chairperson

  
P. O'Keefe, Member

  
C. Boettcher, Member







Ontario Public Service  
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des Relations  
du Travail

180 Dundas Street West, Suite 2100, Toronto, Ontario M5G 1Z8

416/596-0688

T/0009/85

BETWEEN:

The Crown in Right in Ontario  
(Toronto Area Transit Operating Authority)

Applicant

-and-

Amalgamated Transit Union, Local 1587

Respondent

BEFORE:

Owen B. Shime, Q.C., Chairman  
E. C. Witthames and  
J. H. McGivney, Q.C. Tribunal Members

FOR THE UNION:

Mr. Lorne Richmond  
Sack, Charney, Goldblatt & Mitchell  
Barristers and Solicitors

FOR THE EMPLOYER:

Mr. E. T. McDermott  
Osler, Hoskin & Harcourt  
Barristers and Solicitors





## DECISION

This is an application pursuant to Section 40 (2) of The Crown Employees Collective Bargaining Act to determine whether certain proposals by the union during bargaining come within the scope of collective bargaining under this Act.

The parties have filed extensive submissions with the Tribunal, and we do not propose to repeat the arguments; it is sufficient for the purposes of this decision merely to indicate that the employer maintains that the proposals in issue encroach upon its exclusive right to manage pursuant to Section 18 of the Act, while the union claims that its proposals fall within the permissible areas of collective bargaining under Section 7 of the Act and do not infringe upon the functions of the employer under Section 18.

This Tribunal has attempted to reconcile Sections 7 and 18 of the Act by examining objectively the nature and effect of the proposals to determine under what section the proposal may reasonably be considered to fall. OPSEU The Crown in Right of Ontario T/32/81.

Before turning to the specific proposals a brief comment about the union's submissions is necessary. In general the union appears to attack the usage by the employer of part-time employees. In two of the proposals there are attempts to restrict the hiring of part time employees while in other instances there are attempts to restrict their use and deployment. We make no comment about the merit or lack of merit in the union's position. Suffice it to say bargaining



under The Crown Employees Collective Bargaining Act grants to the employer the exclusive function to determine such matters as employment, complement, organization and assignment and then the Act goes on to state that "such matters will not be the subject of collective bargaining nor come within the jurisdiction of a board". Presumably the board referred to is a board of arbitration hearing interest disputes which is an extension of the bargaining process.

The approach taken by the union in this case has been tantamount to firing a broadside at the management citadel. Thus while certain stated objectives in support of some of the proposals might appear to be legitimate they must be read in context. In other respects the language of the proposals does not reflect their stated intent and as this Tribunal has previously indicated we must be cautious about "wolf in sheep's clothing" proposals.

Also in previous decisions we have indicated that Section 18 is not impregnable and we have suggested that where legitimate proposals properly drafted fall under Section 7 they will be allowed even though they may encroach on Section 18. We now turn to examine the specific proposals in the light of the legislation and the arguments submitted.

(a) Article 22.02

22.02 The normal hours of work for part-time employees shall not exceed thirty-three in a week. Employees presently working more than thirty-three hours and less than forty hours per week shall hence-forth be assigned to work forty hours per week if they so desire.



(b) Articles 22.04 and 37

22.04 The Employer shall not increase the number of part-time employees presently employed during the course of this collective agreement.

37 The Employer shall not hire any part-time drivers during the life of this collective agreement. Part-time drivers hired after October 31, 1984, shall, subject to a letter of understanding re existing part-time bus drivers and applicants, be appointed to full-time bus driver vacancies that become available on the basis of their seniority, and the Employer shall not be required to post such vacancies.

It appears that the parties have defined part-time employees as those who do not work in excess of thirty-three hours in a week. On its face Article 22.02 compels the employer to give part-time employees forty hours of work if they so desire. An objective reading of this article goes beyond the unions suggested position that this is an overtime article. Rather this article commands the employer to assign these employees at their wish and infringes on the employer's right to determine complement and assignment. The article is disallowed.

Article 22.04 imposes a limit on the number of part-time employees. The union in its argument contends that this provision is to encourage GO Transit to create full-time job opportunities and also states that "it would not interfere with GO's staffing commitments as its present complement — is adequate for the job." Inherent in the argument is the recognition that the proposal may interfere with complement.





Although the union submits that the proposal would not interfere with the "present complement" it is usual for such articles once granted to remain in collective agreements. While amendments may be made from time to time it is unusual for articles to be removed through collective bargaining or by interest arbitration boards. "Give backs" are not the norm in bargaining.

The employer, or government, is required to meet the needs of the public and to continue to meet those needs as they arise. To this end it must be able to determine the number of employees required to meet its public service requirements. Thus, it has, under Section 18, reserved unto itself the right to determine organization and complement. On balance the proposed article as drafted is a direct curtailment of that right and is disallowed.

For similar reasons the first sentence in the proposed Article 37 which limits the right to hire part-time employees is disallowed. However the second sentence in Article 37 which gives part-time employees preferential treatment, based on seniority, where full-time vacancies occur does not interfere with the employers rights under Section 18. It is similar in kind to other articles commonly found, which grant existing employees rights, privileges and preferences based on seniority.

(a) Article 21.03

The Union's Proposal

21.03 In assigning overtime, the employer shall not deprive full-time employees of overtime by assigning work to part-time employees or employees defined in section 1 (i) (f) (vi) of the Crown Employees Collective Bargaining Act. \*



On its face this article attempts to restrict the use of part-time employees in overtime assignments by requiring the employer to assign overtime to full-time employees. It is not simply an initiative to improve overtime allowances or remuneration for full-time employees. Rather it compels the employer to assign in a certain manner as well as interfering with the employer's determination about organization. Theoretically, all work assigned to part time employees might be assigned as overtime to full time employees. The proposal then could eliminate part-time employees. This proposal at the very least interferes with the employers right to assign under Section 18 of the Act and is disallowed.

(b) Article 22.03

The Union's Proposal

22.03 In assigning work at any location, employees who normally work at that location shall be offered the work prior to the work being assigned to employees from another location.

Similarly Article 22.03 which compels the employer to assign work to employees normally working at a location interferes with the Employer's right to assign employees. The union contends that this article is to prevent the employer "assigning" work to part-time employees rather than paying overtime to full-time employees who normally work at the first location. On its face the article is drafted so that, objectively, its main thrust is to interfere with the employer's right to assign work and not to the union's claimed purpose and is disallowed.

We also note that this proposal is not clear. It gives preference to employees at a given location. Does the preference relate also to overtime work? Must employees off shift be called in before work is offered to others? Thus, since





the purpose of the proposal on its face is vague, it is disallowed.

4. Article 35.02

The Union's Proposal

35.02 The Employer shall not contract out bargaining unit work while bargaining unit employees are on lay off or absent due to illness; nor shall the Employer contract out work that results in the lay off of bargaining unit employees.

The proposal is similar in nature to others submitted to this Tribunal. In previous decisions we have indicated that we would not prohibit the employer contracting out because it interferes with its rights under Section 18, but that we would reconcile the employer's interests with the union's right under section 7 of the Act to bargain about the impact or effect of contracting out on employees who might be adversely affected eg. laid off or the result of contracting out. The union's proposal in this case goes beyond the limits permitted by our previous decisions. As drafted the proposal substantially prevents contracting out.

In OPSEU and The Crown in Right of Ontario T/19/84 (October 4, 1984) we allowed a proposal "only to the extent that it seeks to mitigate the effects of contracting out". When the proposals were more firmly and specifically drafted



the employer again objected to the contracting out provision because it established a complete prohibition. In a supplementary decision we determined that the proposal as drafted completely eliminated the employers rights and thus we disallowed the proposal.

In this instance the proposal virtually eliminates the employer's right to contract out. Given the conditions in the proposal there is virtually no situation where the employer could contract out, and even if one may find such a situation it would be found, within the cracks of the proposal. The proposal goes too far and therefore it is disallowed.

5. The Union's Proposal with Respect to Employee Appraisals

The Union's Proposal (new)

34.10 Employee appraisals shall be made once per employee per classification on the first anniversary of the employee's placement in the classification. Appraisals shall be made on a form to be approved by the union. Both the employee and the union shall receive a copy of the employee's appraisal. An employee who believes his appraisal is unreasonable or unfair shall have the right to grieve this appraisal in accordance with the grievance and arbitration procedures contained in this collective agreement. Appraisals are solely for the benefit of the employee and shall not be used in determining promotions, layoffs, transfers or any other matter coming within the collective agreement.

The employer has the right to appraise employees under Section 18 of the Act. The union's proposal severely limits the employer's right in this regard. The proposal limits the appraisals to once per employee per year and also requires the union to approve the form. In our view these limitations seriously encroach on the employer's rights under Section 18 and are accordingly disallowed.



However we do not think that the right of the union and the employee to receive a copy of the appraisal and the right to grieve an appraisal which an employee believes is unreasonable or unfair violates Section 18. Section 18 (2) (b) of the Act permits an employee to grieve if he/she has been appraised contrary to the opening words of Section 18 (2). That right is "in addition to any other rights of grievance under a collective agreement." Thus the section suggests the possibility of expanded rights to grieve under the collective agreement. We do not read Section 18 (2) as limiting the right to grieve to the grounds contained in the section.

The last sentence of the proposal which limits the appraisals use is also disallowed. The employer has the right to appraise. It has that right and presumably it has that right so that it may utilize the appraisals for purposes it deems fit. The limitations imposed by the union's proposal so severely limit their use that it almost renders the appraisal process meaningless. The encroachment on the right is too severe and not warranted by anything under Section 7 of the Act.

6. Article 34.11

34.11 An Apprenticeship Committee consisting of two employees elected from the bargaining unit and two members of management shall be put in place during the term of this collective agreement, for the purpose of developing a mutually agreed upon apprenticeship program.





We agree with the employer's position that apprenticeship is for the purpose of training and developing employees. That right is given to the employer under Section 18. By requiring an "initially agreed-upon apprenticeship program" Article 34.11 gives the union the right to participate in that program on an equal footing with the employer. We do not agree with the union that this is an exploratory and consultative committee. Section 18 of the Act, which makes training and development an exclusive employer function, subject, only to review with the bargaining agent, and not the subject of collective bargaining, is violated by the proposal. The proposal is therefore disallowed.

7. Article 34.04

The Union's Proposal

34.04 A joint union-management committee composed of two members of management and two persons elected from the bargaining unit shall be established for the purposes of arriving at agreed job descriptions during the term of this collective agreement.

This proposal merely gives the union the right to participate in describing jobs. This Tribunal recognizes that the classification of positions is an employer function. The employer insists that the proposal interferes with its right to determine "organization, assignment, work methods and the classification of positions." We note that under Section 7 the union has the right to bargain about "the classification and job evaluation system."

In our view the right to participate in describing jobs does not interfere with the employer's function under Section 18. This proposal merely gives the union the right to participate with the employer in describing jobs that are



performed by the employees already assigned and organized in a manner determined by the employer. Description is a step that takes place prior to classification. It may ultimately touch upon or affect the classifying of the employee. However the union has some rights pursuant to Section 7 to bargain about the classification and job evaluation system and in our view the participation in describing jobs stems from the unions right under Section 7 and does not interfere with the employer's functions under Section 18. We also do not agree with the employer's contention that the describing of jobs is an infringement on the right to determine content or composition of the jobs. The proposal is therefore allowed.

## 8 New Classifications

### The Union's Proposal

The Union proposes to add two new employee classifications: Repair Mechanic/Air Conditioning and Repair Mechanic/Electrical.

It is clear that the way in which the employee work force is organized, the number of employees, the way in which they are assigned, and the classification of their positions is an exclusive management function. By requiring that the employer add or insert two new positions classified in a certain way into the work force directly interferes with these employer functions under Section 18 of the Act.



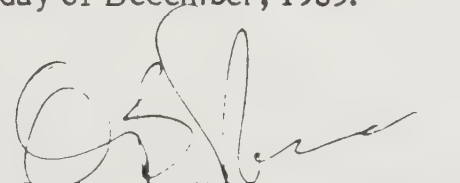


However, it is open to the union to bargain and arbitrate about rates of remuneration for existing classifications. The language of such a proposal has not been submitted to this board. Accordingly we decline to rule on such a proposal until the time a properly worded proposal is placed before the Tribunal.

The union has submitted with respect to all the proposals that in the event there are words or phrases which contravene Section 18 that the Tribunal indicate which words ought to be excised from the proposals so as to make them proper ones for the Board (of arbitration) to consider. While this Tribunal has from time to time suggested that it may indicate if certain words were omitted a proposal would be valid, we do not see that our adjudicative role encompasses being the draftsman for one of the contending parties. In the circumstances of this case that request is denied.

Also the union has submitted certain arguments concerning the impact of the Charter of Rights and Freedoms on the provisions of The Crown Employees Collective Bargaining Act. Our decision in that respect is reserved and is subject to oral argument by the parties. Should the union wish to pursue the matter it shall advise the Registrar who shall fix a date for argument. In that respect the matter is referred to the Registrar.

Dated at the City of Toronto, this third day of December, 1985.

A handwritten signature in dark ink, appearing to read 'O. B. Shime', is written over a horizontal line.

O. B. Shime, Q.C.  
Chairman  
For The Majority



D I S S E N T

IN THE MATTER OF the dispute between the Amalgamated  
Transit Union, Local 1587 and the Toronto Area Transit  
Operating Authority;

AND IN THE MATTER OF an application pursuant to section 40  
(2) of the Crown Employees Collective Bargaining Act.

T/0009/85



Having read the award, I find it necessary to take issue with the majority's position with respect to their view of the restriction - Section 18 of the Crown Employees Collective Bargaining Act places on the union.

The reading of Section 18 of the C.E.C.B.A. must be done in conjunction with Section 7, in particular, in this case, with the wording of Section 7 - including terms and conditions of employment, rates of remuneration, hours of work, overtime ... - These are allowable matters. One cannot, as the award does, take the position that while you stand in Section 18 you cannot be struck down by the words of Section 7. Several of the disallowed sections, though perhaps poorly drafted, do deal with terms and conditions of employment, rates of remuneration, hours of work and overtime.

The Union is not firing broadside at Management's Citadel as the award suggests, rather, they are standing on the firm ground of Section 7 at the very gateway to the Citadel demanding the right to be heard under Section 7 of the C.E.C.B.A.

It is necessary to detail those proposals where the opinions of this member dissents from that of the majority. Proposals that are not referred to in this dissent are matters where there is no basic disagreement of the position taken in the award as applied under the C.E.C.B.A.

#### DISSENTING MATTERS

(a) Article 22.02

22.02 The normal hours of work for part-time employees shall not exceed thirty three in a week. Employees presently working more than thirty-three hours and less than forty hours per week shall hence-forth be assigned to work forty hours per week if they so desire.

(b) Article 22.04

22.04 The Employer shall not increase the number of part-time employees presently employed during the course of this collective agreement.





Section 22.02 is recognizably standing with one foot in Section 7 and the other in Section 18 of the C.E.C.B.A. It is, nevertheless clear that the whole thrust of the union's proposal is to protect and strengthen job security, at the same time, defining hours of work and overtime hours and should be allowed.

Section 22.04 as presently composed is an infringement of the employer's rights as the Act defines those rights. The proposal is obviously a protective and necessary one. The Union should be given the opportunity to add necessary language or redraft to show that the limitation they seek is to protect existing full time employees.

#### UNION'S PROPOSAL - OVERTIME

##### Articles 21.03 & 22.03

21.03 In assigning overtime, the employer shall not deprive full-time employees of overtime by assigning work to part-time employees or employees defined in section 1 (i)(f)(vi) of the Crown Employees Collective Bargaining Act.

22.03 In assigning work at any location, employees who normally work at that location shall be offered the work prior to the work being assigned to employees from another location.

Section 21.03 is not read by this Board member as the chairman and my colleague read it. This member reads it as an attempt to negotiate protection on the question of overtime distribution. Hours of work and overtime are allowable in Section 7 of the C.E.C.B.A. as a negotiable matter.

The mere fact that union uses the word "assigning" does not in the opinion of this board member mean an automatic denial of the right to have their proposal put to an arbitrator. This proposal should have been allowed.



Section 22.03 is another proposal dealing with overtime. Its standard language found in many private sector collective agreements. Admitted, the reference to overtime as such, is not to be found in the body of the language, though there is no question as to the meaning of this proposal when you look at the heading under Tab #1 (overtime) of the union's submissions to the Tribunal.

Again we have that word "assignment" to deal with - Section 18 of the C.E.C.B.A. puts the word under a cluster of others and claims it as part of management's exclusive functions. The Tribunal must look to the sense in which the word is used by either party, not merely exclude the whole proposal because of an expression using words that can be extracted from one or the other sections of the C.E.C.B.A. or, because the drafting fails to clearly state the primary reason, the heading to the proposal is clear. This member would have allowed this proposal to go to the arbitrator on the understanding that it was dealing with the scheduling of "overtime".

#### APPRENTICESHIP COMMITTEE

##### Article 34.11

34.11 An Apprenticeship Committee consisting of two employees elected from the bargaining unit and two members of management shall be put in place during the term of this collective agreement, for the purpose of developing a mutually agreed upon apprenticeship program.

Section 34.11 - the award speaks to this question by agreeing with the employer's position that apprenticeships are for the purpose of training and developing employees.

Section 18 of the C.E.C.B.A. does exclude from bargaining "training and development". But let us not get ahead of ourselves in that rush to clobber the Union with Section 18.

The Union's proposal is exploratory only. Let us credit it as a valiant effort to get those much needed apprenticeship programs started to train Canadian youth.



The union wants to set up a committee to see what can be accomplished. There is no nefarious scheme to take over the management of "Go Transit", just a simple committee to look at what is possible. This member would have allowed the proposal to go to the Arbitrator.

#### NEW CLASSIFICATION

##### The Union's Proposal

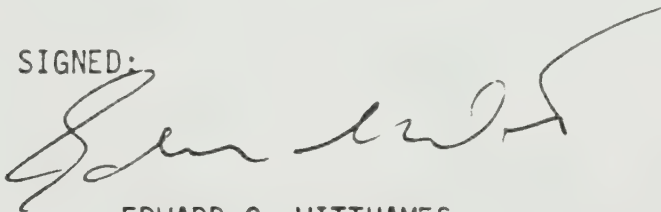
The Union proposes to add two new employee classifications: Repair Mechanic/Air Conditioning and Repair Mechanic/Electrical.

It appears these two classifications were established by the employer. One can only assume, during the life of the previous agreement, and paid a yearly, or prorata, a premium in a lump sum.

If it's the right of management, as the employer puts it, to create new jobs and in some cases classifications, they have done that, they have even agreed to post them. The Union, rightly so, wants the agreement on these classifications to be put in the contract with the premium applied to the wage rates. The employer appears to be putting up a smoke screen just to avoid rolling into the wage rate the yearly premium of \$250.00

This is clearly a matter of wages and is squarely under Section 7 of the C.E.C.B.A.

SIGNED:

A handwritten signature in black ink, appearing to read "Edward C. Witthames", written over a horizontal line.

EDWARD C. WITTHAMES  
Board Member











T/0019/85

**THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT**

**R.S.O. 1980, c.108**

**ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL**

**Between:**

Ontario Liquor Boards Employees Union

Applicant

and

Liquor Control Board of Ontario  
Liquor Licence Board of Ontario

Respondents

and

Manpower Temporary Services  
Olsten Temporary Services

Intervenors

**Before:**

M. Mitchnick  
E.C. Witthames  
R.M. Drennan

Alternate Chairperson  
Member  
Member

**For the Applicant:**

S. Wahl  
Counsel  
Koskie & Minsky  
Barristers and Solicitors

**For the Respondents:**

P. Jarvis  
Counsel  
Hicks Morley Hamilton Stewart & Storie  
Barristers & Solicitors

**For the Intervenors:**

R.M. Parry  
Counsel  
Mathews, Dinsdale & Clark  
Barristers & Solicitors

**Hearings:**

February 11, 1988  
March 17, & 18, 1988  
June 13, & 14, 1988



DECISION

This is an application to the Tribunal pursuant to the provisions of section 40(1) of the Crown Employees Collective Bargaining Act. Section 40(1) provides:

If, in the course of bargaining for a collective agreement or during the period of operation of a collective agreement, a question arises as to whether a person is an employee, the question may be referred to the Tribunal and its decision thereon is final and binding for all purposes.

The matter in fact began, however, with the following grievance filed by the Union against the LCBO and LLBO on January 14, 1985:

NATURE OF GRIEVANCE AND CLAUSE(S) VIOLATED:  
1.1(a) This grievance deals with the contracted workers presently employed at the head offices of the Boards and at the LCBO warehouses. These workers are being paid, at an unknown rate, through the agency through which they were acquired. The union considers these workers to be part of the bargaining unit. Since they are directed in their day to day functions in a detailed way by LCBO/LLBO management personnel they should be deemed to be employees of the Boards, and therefore come under the scope of the collective Agreement.

SETTLEMENT DESIRED: That these employees be allowed to enjoy all the rights and benefits presently received by part-time/temporary employees (as detailed in the current Collective Agreement) and further, that union dues be deducted from these employees. The Union also desires a list of the names of employees presently engaged in "contracted out" work at the head office of the Boards and their warehouses.





As can be seen, the major issue underlying the grievance concerns the status of certain kinds of "temporary" staff being utilized by the Boards. It should be noted in that regard that there is an express recognition of the Union as bargaining agent for "Part-time Store Cashiers and Temporary Employees" in Article 1.1(b) of the parties' collective agreement. Article 1.1 of that agreement provides more fully:

Article I - Recognition

1.1(a) The Boards recognize the Union as the exclusive bargaining agent for all employees in the classifications shown in Schedule "A" appended hereto.

(b) Solely for the matters dealt with in Article 30, Part time Store Cashiers and Temporary Employees, the Boards recognize the Unions as the exclusive bargaining agent for employees employed as Part Time Store Cashiers and Temporary Employees.

The matters dealt with in Article 30 are essentially hours of work and overtime, responsibility pay, protective clothing, vacations and vacation pay, pay in lieu of benefits, and consideration for vacancies when they arise.

Article 1.3 as it then was provided:

1.3 ... If any question arises as to whether a person is an employee and covered by the Collective Agreement, the Boards and the Union shall meet to discuss the issue and failing



settlement, the matter may be dealt with under Section 40 of the Crown Employees Collective Bargaining Act.

The Boards take the position that the persons in question are not "employees" for the purpose of the Crown Employees Collective Bargaining Act, having regard to certain exclusions thereunder, and indeed, are not their employees at all. The matter has accordingly been put to the Tribunal to determine those issues, as the application states, "prior to the final arbitration of the grievance by the Grievance Settlement Board."

That Act obviously applies only to "Crown Employees", with "Crown" being defined in the Act as "Her Majesty in right of Ontario". The term "employee", to begin with, is stated under the Act, in section 1(1)(f), to mean "a Crown employee as defined in the Public Service Act". That Act in turn defines a "Crown employee" as:

1. ...

- (e) "Crown employee" means a person employed in the service of the Crown or any agency of the Crown, but does not include an employee of Ontario Hydro or the Ontario Northland Transportation Commission.

At the outset of the proceedings it was outlined to the Tribunal that the application involved the following areas



of "temporary" employment utilized by the Boards, either from the government's Go-Temp Program, or from outside employment agencies:

- (1) clerical staff at each of the Boards' Head Office, located on Lakeshore Blvd.;
- (2) security guards supplied by the Canadian Corps of Commissionaires at the Boards' Head Office;
- (3) persons employed in the Boards' warehouses throughout Ontario.

Mr. Jarvis notes, on behalf of the Boards, that there are a vast number of "temporary" employees who are employed directly by the Boards, particularly in the stores, but also in the warehouses, and who are scheduled in advance in the same way as full-time employees of the Boards. It is the evidence of the Boards that these are the persons to whom Article 1.01(b) has always been applied. On the other hand, Mr. Jarvis notes, the persons now in dispute have never been treated as employees of the Boards, falling under the terms of the parties' collective agreement, and the Boards make it clear that they would raise an argument of estoppel against past claims for damages under the collective agreement were such a matter ever to become material (it was made clear by the Tribunal that that is not a matter that is before us in the present proceedings, nor is the question of the scope of the collective agreement itself). In





addition, Mr. Jarvis notes, the whole issue of the use of "casuals" (which we take to be a reference to the type of persons now here in dispute) has been submitted to a board of interest arbitration for consideration.

There is no question but that the use of such "casual" employees, whom the Boards have not treated as falling under the scope of the parties' collective agreement, is substantial, and it has required a mammoth amount of co-operation and concentration of effort on the part of the parties and their counsel to reduce this matter to the form in which it was able to be litigated before the Tribunal in the number of days that it was. In addition, the parties in the course of their good-faith deliberations were able to work out a resolution of the "warehouse" portion of the application (and underlying grievance) in the following terms:

ONTARIO LIQUOR BOARDS EMPLOYEES' UNION

Applicant

- and -

LIQUOR CONTROL BOARD OF ONTARIO  
LIQUOR LICENCE BOARD OF ONTARIO

Respondents



MINUTES OF SETTLEMENT

WHEREAS the Ontario Liquor Boards Employees Union filed a grievance dated January 14, 1985.

AND WHEREAS an application to the Ontario Public Service Labour Relations Tribunal was made by the Ontario Liquor Boards Employees Union on September 12, 1985.

AND WHEREAS the parties are desirous of resolving the warehouse components of the grievance and application.

NOW THEREFORE the parties agree as follows:

1. The Liquor Control Board of Ontario agrees that from on and after the date hereof, it must utilize LCBO permanent and temporary employees, employed pursuant to the collective agreement between the parties, for the performance of all warehouse worker work functions performed at its warehouse premises throughout Ontario. It is further agreed that the LCBO shall establish pools, of reasonable size and configuration, of temporary employees for each of the warehouse premises. In circumstances where the LCBO is unable to utilize permanent and/or temporary employees to perform warehouse worker work functions after reasonable efforts have been made to do so, the LCBO shall be free to utilize personnel of casual help agencies, without collective agreement application.
2. The parties shall meet to achieve agreement on:
  - (a) the size and configuration of the pool of temporary employees for each of the warehouse premises; and
  - (b) the efforts to be made by the LCBO to utilize temporary employees pursuant to the collective agreement, to perform all the warehouse worker work functions performed at the warehouse premises,

on or before January 30, 1987, failing which this settlement shall be null and void and the grievance and/or application with respect to all warehouse worker work functions performed at the warehouse premises shall continue.



3. The grievance and application, in the event of such agreement being reached by the parties, shall be deemed to be withdrawn as they relate to the performance of all warehouse worker work functions performed at the warehouse premises and no further action of any kind shall be taken with respect to that aspect of the grievance or application.

Dated at Toronto this 12th day of January, 1987

ONTARIO LIQUOR BOARDS  
EMPLOYEES UNION by its  
solicitors Koskie and  
Minsky

LIQUOR CONTROL BOARD OF  
ONTARIO  
LIQUOR LICENCE BOARD OF  
ONTARIO

Per: Stephen Wahl

Per R. McDougall

The matters left to be dealt with in paragraph 2 of the Minutes have since been worked out as well, and reduced to terms filed with the Tribunal:

AGREEMENT BETWEEN LCBO AND OLBEU  
RE POLICY GRIEVANCE LCBO 8/85 (T19/85)

As settlement of the issue of usage of agency personnel within the warehouses of the LCBO, the parties agree to the following:

1. Pools of temporary employees shall be set up in the following configuration:
  - Pool 1 - Department 940 - Toronto  
          Department 739 - Toronto Distribution Depot  
          Department 960 - Bottling
  - Pool 2 - Department 947 - Durham Regional Warehouse
  - Pool 3 - Department 950 - London Warehouse
  - Pool 4 - Department 955 - Ottawa Warehouse
  - Pool 5 - Department 970 - Thunder Bay Warehouse.





2. The size of each pool shall be determined as being equal to the maximum number of temporary employees on staff at each warehouse in the period January 1, 1986 - December 30, 1986.
3. The pool shall be made up of temporary employees who worked at each warehouse in the period January 1, 1986 - December 30, 1986.
4. The LCBO undertakes to contact each temporary employee by mail to determine their interest in future work. Only those responding will be placed in the pool. These lists shall be updated as of March 1 and September 1 of each year.
5. If the total number of individuals responding does not meet the number required for a complete list in each warehouse, subsequent applicants shall be added to the list to reach the required quota. It is understood they shall be placed at the bottom of the list.
6. The personnel of the pool shall be listed in descending order by total number of hours worked for the Board since originally hired.
7. It is agreed that for work which cannot be scheduled, the warehouse will contact the eligible employees and offer work. Where needed at least two telephone calls shall be made to establish contact.
8. The parties agree to review this procedure annually or whenever a major problem arises.
9. The union shall be provided with copies and updates of the applicable lists in each warehouse.
10. The parties agree to review this procedure immediately upon the issuance of the Picher arbitration decision.

The "warehouse" issue is accordingly no longer before the Tribunal. The parties were not, however, able to reach a similar accommodation on the remaining portions of the



application, and those will now be dealt with by the Tribunal, beginning with the use of "agency" security guards.

The security guard issue is not a question of the use of casual or temporary employees. The information desk at the Boards' head office at 55 Lakeshore Blvd. East is staffed during the hours the building is open to the public, and continuing to 11:15 p.m., by regular employees of the LCBO, covered by the collective agreement. Some years ago, it was decided to assign the night shift security function to individuals supplied by the Canadian Corps of Commissionaires, and it is that continuous "contracting-out" of the night security function that is at issue here.

The Canadian Corps of Commissionaires is of course a familiar organization, long in the business of supplying individuals, normally of retirement age, to perform security-type services to various public and private employers. That there is a bona fide "arm's-length" relationship here between the Corps and the LCBO that has contracted for its services, therefore, is not in question here. That, however, is not the end of the matter. Particularly where existing bargaining rights under a collective agreement are being impacted, labour-relations tribunals have, over the years, shown an increasing tendency to look more closely at these



"third-party" relationships in order to make a determination of who the "true employer" is. And a reading of the cases leaves one with the distinct impression that such tribunals are especially vigilant of a Union's bargaining rights where:

- (1) the "contracting-out" is in fact a "contracting-in" (i.e., where the work contracted out continues to be performed at the premises of the customer), and
- (2) where there is no significant degree of on-site supervision from the contractor to minimize the need for day-to-day control over the work function on the part of the customer (compare for example, the decision of the Ontario Labour Relations Board, cited before us here, in Caressant Care Nursing Home of Canada Limited, [1984] OLRB Rep. November 50).

A couple of the more recent cases, in particular, are worth noting in detail, as they involve the provision of security services, by established outside contractors, in much the same way as the present case.

The first of these is the Royal Ontario Museum case (1984), 16 L.A.C. (3d) 1 (Adams). The Museum had a collective agreement with Local 204 of the Service Employees' Union, and employed thereunder some 40 to 44 security guards. In 1983, however, the Museum saw a need for some 30 additional guards, for a period of four months, as a result of two major special





exhibitions. The Museum accordingly made the decision to "contract out" that security-guard work, for the finite four-month period, to Burns International Security Services Limited. The contract with Burns provided, in simple terms, for the following, as noted in the decision at page 3:

... Burns agreed to supply the museum with uniformed security personnel equipped with Burns uniforms. The contract was expressed in dollars per hour per person supplied. Burns paid the personnel supplied \$3.90 per hour. Burns, as well, made all of the standard deductions. Burns hired the persons it supplied. It also trained these individuals to the extent that they were shown a four-hour movie.

And in particular, the contract noted:

E. Employees

The parties intend that an independent contractor relationship will be created by this contract. BURNS shall not be considered to be an agent or an employee of Client for any purpose. Security Personnel of BURNS are not entitled to any of the benefits that Client provides for Client's employees. Security Personnel are employees of BURNS and BURNS will pay all wages and other payroll related costs of Security Personnel. BURNS will exercise complete control over the conduct, duties and all other matters concerning Security Personnel.

...

G. Supervision and Quality Assurance

BURNS shall be responsible for the direct supervision of all Security Personnel through designated representatives, who



will be available at reasonable times to consult with client.

#### H. Service

The services to be rendered under this Agreement by BURNS shall be in conformity with operating procedures mutually agreed upon by Client and BURNS. If, at the request of client, Security Personnel are assigned duties other than those agreed to by BURNS, Client shall assume complete responsibility for any and all liability arising therefrom. BURNS will remove from service as soon as qualified replacement is available any Security Personnel who, in Client's opinion, are not qualified to perform the work assigned.

The decision goes on to set out the other details of the arrangement as follows:

Burns invoiced the museum every second week and copies of these invoices were introduced into evidence. Burns kept the records of the hours worked by the personnel supplied and the museum checked invoices against these records. The only equipment provided by the Museum may have been a few walkie-talkies. Burns had four "floaters" to replace the personnel supplied on lunch-breaks and coffee-breaks and one of these floaters was a lead hand who supervised the personnel supplied. Burns determined the shifts that these people would work and assigned the posts to them. However, the museum advised Burns what number of people were required on any particular day and in which galleries. Burns determined the lunch-breaks and provided relief for persons on lunch-breaks. A supervisor for Burns attended at the museum once a day at the beginning of the shift to make certain assignments and deal with particular problems.

Museum staff oriented the new personnel to the building, i.e., fire exits and floor plans,



etc. Each person supplied by Burns was given a copy of a hand-out available to the public indicating the rules and regulations of the museum. All of the museum supervisors were told to be careful to report any problems with personnel supplied by Burns to the Burns supervisor or lead hand. They were not to deal with such personnel directly. Mr. Baker testified that the museum could not discipline or discharge these persons. However, any time a problem was reported to the Burns supervisor or the lead hand the problem was solved and, on occasion, the person in question was removed by Burns. Mr. Baker agreed that the personnel supplied by Burns did not have their assignments confined to the special exhibitions. They were from time to time mixed with museum guards and were assigned to "normal gallery space" as well as the special exhibitions. This was due to the fact that the hours of the museum were extended generally and not confined to the areas where the special exhibitions were located. Thus, the employer needed additional hours in the general areas.

Arbitrator Adams began his analysis of the jurisprudence by referring to the 40-year old case of Norton Co. of Canada, (1953), 4 L.A.C. 1451 (Fuller), which as it happens, actually involved the Canadian Corps of Commissionaires itself. The arbitrator noted, commencing at page 20:

One of the first cases to deal with this type of issue involved a plant guard. In Re Norton Co. of Canada, Ltd., Hamilton and U.S.W., Local 3696 (1953), 4 L.A.C. 1451 (Fuller), a bargaining unit employee had acted as a gate guard and monitored the employees' parking-lot. The job was one covered by the collective agreement between the parties and this particular employee had union dues deducted. The employee retired and the company received no applications for the job vacancy. The company then proceeded to





enter into an agreement with the Canadian Corps of Commissionaires (hereinafter referred to as C.C.C.). The formal agreement between the company and C.C.C. provided for complete administrative and disciplinary control by C.C.C. over the guard to be sent to the company and that C.C.C. would pay the individual and take care of holidays and unemployment insurance and illness, etc. For this, the company paid an hourly rate for the number of hours worked by the guard provided. The maintenance and general foreman of the company, however, instructed the guard as to his duties from time to time and the foreman checked his work to see that it was satisfactory. If his work proved to be unsatisfactory, the company had no right to discipline but reported the matter to C.C.C. At the time the agreement was made with C.C.C., there were three company employees on lay-off. There was no written contract between C.C.C. and the company.

In instructing itself as to the appropriate legal principles, the board of arbitration had the following to say [pp. 1454-5]:

In determining whether the contract amounted to one for services, as distinct from a contract of service, some assistance can be derived from the Law of Master and Servant. It is stated in Diamonds' "The Law of Master and Servant", Second Edition, at Page 1, that

"The relation of master and servant exists between two persons whereby Agreement between them, express or implied, the one is under the control of the other.

"A person is under the control of another if he is bound to obey the orders of that other not only as to the work which he shall execute, but also as to the details of the work and the manner of its execution."

At Page 5 it is stated that

"The question of whether a person is under the control of another is a question of fact. Control may exist between two persons although the one



- (1) did not appoint the other;
- (2) does not pay the remuneration;
- (3) has no power to dismiss; and
- (4) has not the exclusive control."

There are many cases on the subject and, while the cases are largely concerned with the question of liability for negligence, the reasoning employed in the decisions as to whether or not, for the purpose of determining the liability for negligence, a man is a servant of one person or another at a particular time is of some assistance. One important question, in determining the matter of control, is: Was the employee exercising a discretion in the performance of the duties given to him by his general employer or is he obeying the specific order of the person for whom he is temporarily working? It also has been held that where "A" contracted with "B" to supply him, by day, a horse and driver, "A" was not the master of the driver whilst being driven by him although he instructed the driver from time to time where to go. It was stated, however, that had "A" exercised control - for example, having supervised the actual management of the horse or vehicle - he would have been considered to be the master and therefore liable for the torts of the driver while was driving him.

Arbitrator Adams continues:

The board of arbitration went on to apply these principles and conclude that the guard supplied by C.C.C. was an employee of the company bound by the collective agreement and, in so employing the man, was obligated to comply with the provisions of that agreement. The company was therefore obligated to staff the position with one of its employees who was qualified and on lay-off at the time. In this respect, the board wrote [p. 1455]:



In applying the various tests - in particular, reference to the evidence of Mr. Annan, in which he stated the Canadian Corps of Commissionaires was to supply a man to do such services as the Company directed - and the contract and supervision by the foreman, it is the opinion of the Board that, on the evidence before the Board, it must be held that in the present case the contract here was not a contract for service but was a contract of service. This is entirely different from a contract, for example, such as for the cleaning of windows, where a contract is to let to some outside firm to clean windows and the firm supplies the men, who use their own discretion and methods as to how the windows shall be cleaned, or in the case of a contract for snow removal, where the contractor uses his own judgment as to how he shall go about the job.

(emphasis added)

Referring next to the 1963 decision of Philco Corp. of Canada Ltd., 13 L.A.C. 291 (Hanrahan), arbitrator Adams notes as follows:

In Re Int'l Assoc. of Machinists and Philco Corp. of Canada Ltd. (1963), 13 L.A.C. 291 (Hanrahan), the facts disclosed that the company had contracted with an organization called "Manpower Services Ltd." to supply a person to be used while the company was in the process of taking over an inventory from another company. The necessity for additional help the company considered to be a temporary condition and work which it believed could be more economically performed by "contracting out". Manpower Services paid the inventory clerk his hourly wage but the clerk performed work falling within a job classification contained in the collective agreement. The clerk was supervised by one of the company's foremen and in this case the clerk understood the foreman to be his supervisor. It was clear that at no time while he worked at the





plant was there any supervision over the clerk by an employee of Manpower Services. However, it was clear from the documentation that the parties to the labour subcontract considered the clerk to be an employee of Manpower Services.

In finding that the clerk was an employee of the company bound by the collective agreement, the board of arbitration relied upon Judge Fuller's decision in Norton Co. of Canada, Ltd. Indeed, the board of arbitration had no hesitation in coming to this conclusion, holding that the circumstances of control and supervision were clear and unequivocal. The facts supporting this conclusion were stronger than those before this board.

(emphasis again added)

The next decision looked at by Mr. Adams was that of Paul Weiler in Amplitrol Electronics Ltd., an unreported decision dated September 2, 1969. There the company decided to contract out to Phillips Security Guards alarm-monitoring work previously performed by three employees in the Union's bargaining unit. Once again, applying the "control" test, the original employer (represented by a Mr. Beames) was held to be still the true employer:

To the extent that unusual matters arose, Beames' evidence was that he was always consulted. If he wishes something done, including for example, an overlap of two shifts in the manning and rotation (for bank openings and closings), it was done. If Beames did not like the manner in which any routine was performed, he either told the inspector, or the monitors directly, and they obeyed. If he wanted a particular employee taken off the job, he was removed. He and/or his service manager were on the premises and in charge, unlike the



inspectors. Hence there was no evidence of any significant independent control function for the inspectors between Beames and the monitors. For these reasons, applying the control test, Amplitrol appears to be the effective employer of the monitors in this factual situation. Although we are not without some doubt, it would appear that Beames has simply not divorced himself sufficiently from the operation.

That case is of particular interest insofar as it sets out the proposition that, no matter how much the initial employer may have intended to enter into a bona fide business relationship, it will be on the tests developed by the law that the effect of the employer's efforts will ultimately stand to be judged.

Professor Weiler wrote:

The company argued, though, that there was no real alternative arrangements available in achieving a subcontract in those circumstances. However, this contention misses the whole point and significance of the requirement and its tests. When an employer negotiates an agreement with the union, he accepts certain standards by which his employment relations will be governed. He is permitted to exclude certain work from the operation of these standards if he arranges to have it performed by men who are employed by another company. However, his obligation to respect the agreement in connection with his own employees cannot be avoided by the simple colourable device of saying that certain men are not his employees. These men must really be someone else's employees, not his own, and, to this end, the law has established certain tests for determining when the employment relation exists.

Hence, there is nothing incongruous about the company being unable to achieve its subcontract in this case. It wants to have



certain men working continuously on its premises, operating its equipment, under routine standards or specific instructions which largely stem from its own supervision, and paid for out of a fund of hourly payments which is closely related to the hourly wages of these men. At the same time, it wants these men not to be considered its employees so that it need not respect the collective agreement it has freely negotiated and accepted. Unfortunately it cannot "have its cake and eat it too". It must make real organizational and operational changes which are consistent with the actual performance of the work by another company or see itself become the actual employer of men the latter merely supplies. Up to now, the changes have been quite marginal and we must find that the present monitors have been employees of Amplitrol. To use them instead of the grievors is to be a breach of the seniority provision and requires immediate restoration and compensation of the latter.

Mr. Adams then proceeded to review a number of additional cases in the same vein, involving the "contracting-in" of services, and being decided in favour of the Union essentially on the question of on-site control: Bendix-Eclipse of Canada (1970), 21 L.A.C. 19 (Christie); Wean-McKay of Canada (1971), 23 L.A.C. 27 (Palmer); Re Board of Governors of Riverdale Hospital and C.U.P.E., Local 79 (1974), 7 L.A.C. (2d) 40 (Schiff); Re Regional Municipality of Waterloo and London & District Service Workers' Union, Local 220 (1977), 16 L.A.C. (2d) 280 (Brandt); Re Goodyear Tire & Rubber Co. of Canada Ltd. and United Rubber, Cork, Linoleum & Plastic Workers, Local 232 (1977), 16 L.A.C. (2d) 177 (Gorsky); Re Don Mills Foundation for Senior Citizens and Service Employees' Int'l Union, Local 204 (1984), 14 L.A.C.





(3d) 285 (P. Picher); C.I.L. and International Union of District 50, United Mine Workers Local 13328, an unreported decision of S. Schiff dated January 3, 1972. The C.I.L. case in particular involved once again the contracting of security services to another well-known agency, Pinkertons of Canada Ltd. There Professor Schiff wrote:

... In this case, as we have already noted, the "security service" Manual as revised to date is the main vehicle whereby the security guards learn of their duties and, to the extent that the two are separable, how to perform them. The crucial question then looms: whose instructions does the revised Manual contain, those of C.I.L. or those of Pinkertons? On all the evidence we are satisfied that, although C.I.L. may consult with Pinkertons before deciding to change some part of the revised Manual, the determination of the substance of all changes and the authority to implement the determination has rested and continued to rest with C.I.L. We therefore find that the bulk of specific instructions necessarily obeyed by the guards concerning almost all of their job duties - those set out in the revised Manual - are the instructions of C.I.L.

Professor Adams summed up all of this case law, and his conclusions in the case before him, at page 28 of the award as follows:

All of the cases discussed to this point place great emphasis on the matter of day-to-day control and utilization of personnel performing work that would otherwise be handled by employees employed in the bargaining unit.



These cases explicitly or implicitly recognize that many of the other formal aspects of an employment relationship are subject to manipulation and, if given weight, form would triumph over substance. As a result, it is apparent that arbitrators are prepared to make fine distinctions with respect to the appropriate level or degree of control necessary to trigger the finding of an employment relationship. C.I.L., the Wean-McKay case, Amplitrol Electronics and Norton Co. of Canada, Ltd. are illustrations of this observation.

On the facts at hand, and after a great deal of reflection, we have concluded that the control exercised by the museum through at least one contract provision in its agreement with Burns and by way of directions conveyed by museum supervisors through the Burns floater is sufficient, against the backdrop of these cases, to support the finding of an employment relationship between the museum and the personnel supplied by Burns. Also supportive of this finding would be the more general utilization of the personnel supplied by Burns to guard the group entrance and to guard other general areas of the museum. The involvement of the museum must also be considered in the light that this type of work would not typically call for a great deal of supervision. The museum's contact and de facto control of the personnel supplied by Burns cannot therefore be seen as de minimis when compared to the actual control by Burns. Indeed, the involvement of the Burns site supervisor is more in the nature of de minimis.

The second recent decision dealing with the contracting of security-guard services is that of arbitrator Devlin in Maple Leaf Mills Ltd. (1986), 24 L.A.C. (3d) 16. There the watchmen's duties in question had, once again, been performed by members of the bargaining unit, until the decision was made to use personnel assigned to the employer's premises



by Burns International. The individuals so assigned were on Burns' payroll, wore Burns uniforms, and operated under licences held by Burns. Similar to the ROM case, the contract with Burns provided:

### Employees

The Parties intend that an independent contractor relationship will be created by this contract. BURNS shall not be considered to be an agent or an employee of Client for any purpose. Security Personnel of BURNS are not entitled to any of the benefits that Client provides for Client's employees. Security Personnel are employees of BURNS and BURNS will pay all wages and other payroll related costs of Security Personnel. BURNS will exercise complete control over the conduct, duties and all other matters concerning Security Personnel.

### Supervision and Quality Assurance

BURNS shall be responsible for the direct supervision of all Security Personnel through designated representatives, who will be available at reasonable times to consult with Client.

### Service

The services to be rendered under this Agreement by BURNS shall be in conformity with operating procedures mutually agreed upon by Client and BURNS. If, at the request of Client, Security Personnel are assigned duties other than those agreed to by BURNS, Client shall assume complete responsibility for and all liability arising therefrom. BURNS will remove from service as soon as a qualified replacement is available any Security Personnel who, in client's opinion, are not qualified to perform the work assigned.





Further, the Burns operating manual provided:

4. Duties of the BURNS security detail shall be performed in accordance with regulations set forth in the Burns Handbook EXCEPT that where there is any difference between the handbook and/or rules or policies of THE CLIENT those of THE CLIENT shall be followed.

The evidence disclosed that the individuals provided by Burns were subject to somewhat more training than in the R.O.M. case, and Mr. Burns himself testified that he screened and selected each guard personally. Mr. Burns further testified that Burns assumes responsibility for the supervision of its guards, and that this is accomplished by spot checks at least once a week. The learned arbitrator concluded, however, commencing at page 29:

The contract between the company and Burns provides that the parties intend to create "an independent contractor relationship". Security guards supplied by Burns are specified to be employees of Burns and Burns is to be responsible for direct supervision and is to exercise complete control over "the conduct, duties and all other matters" pertaining to its guards. It is necessary, however, to look beyond the statements in the contract to the substance of the relationship between the company and the security guards.

Looking for a moment at the manual containing the guard post orders, it is clear that the orders are designed to suit the company's particular needs. This was



acknowledged to be the case by Mr. Burns and by Mr. Thompson who was required to approve these orders on behalf of the company. In addition, in the event of any conflict between the Burns handbook and the policies and procedures of the company, those of the company are to be followed. It is also clear that the post orders can be changed at any time to suit the company's specifications.

The post orders deal with matters which are particular to the company's operation and specify not only the work which is to be performed but also provide details as to the method and manner in which that work is to be carried out. In fact, the surveillance functions are performed in essentially the same manner as they were performed previously by members of the bargaining unit. There is no evidence of any independent judgment being exercised by Burns with regard to the manner in which the work is performed.

On matters pertaining to individual shifts or matters not dealt with in the manual, the company may provide instructions to the guard. While Mr. Thompson suggested that he might speak with a supervisor from Burns rather than the security guard directly, one is led to the inescapable conclusion that this is a formality only. The company's wishes with regard to the service it requires are to be respected and followed.

The company has also retained the right to remove security guards who, in the opinion of the company, are not qualified to perform the work. While Mr. Thompson also suggested that he might discuss deficiencies in job performance with a supervisor as opposed to the security guard, it is clear that the company may insist that a replacement be provided. The company, therefore, has retained control over the personnel assigned to its operations.

What the foregoing cases demonstrate is an attempt on the part of those called upon to adjudicate this "true



employer" issue to identify, in the words of the Ontario Labour Relations Board in Sutton Place Hotel, [1980] OLRB Rep. Oct. 1538, at 1553, "the seat of fundamental control" over the employees in question, as opposed to someone acting simply in the capacity of a "paymaster" or "payroll agent" (K-Mart Canada Limited, [1983] OLRB Rep. May 649, at 663; Ralston Purina, [1979] OLRB Rep. June 552), or perhaps as more aptly put in Don Mills Foundation, supra, at 419, as a "personnel department" for the actual employer. In all of these it is that "control" function which tends to be accorded the principal weight, as many of the other factors referred to in the cases from time to time, such as:

...

- (2) the party bearing the burden of remuneration;
- (3) the party imposing discipline;
- (4) the party hiring the employees;
- (5) the party with authority to dismiss the employees;
- (6) the party who is perceived to be the employer by the employees; and
- (7) the existence of an intention to create the relationship of employer and employee

have been found to be vulnerable to arrangements as to "form", as opposed to "substance" (see K-Mart Canada Limited, supra, at 662-3; Sylvania Lighting Services, [1985] OLRB Rep.





June 1173, at 1175; and the observations of Mr. Adams referred to at page 19, supra). Mr. Jarvis on behalf of the Liquor Control Board seeks to rely, in contrast, on an earlier decision of the Ontario Board in Templet Services, [1974] OLRB Rep. Sept. 606. That case involved the use of labourers supplied by Manpower Business Services to perform certain carpentry work for a customer acting in the capacity of a "project manager". The decision is limited in its use, however, by the relatively brief exposition of its facts, and its consistency with later decisions of the same tribunal has in any event been called into question (see, e.g., the ROM decision of Mr. Adams, at pages 30-31). Mr. Jarvis also relies on the arbitration award of R. O. MacDowell in Ford Motor Co. of Canada Ltd. (1981), 1 L.A.C. (3d) 141, in which Mr. MacDowell raises the question of the appropriateness of applying what began as tort doctrines of "control" to the issue of an employer-employee relationship in other contexts. Mr. MacDowell in his decision concludes that the security guards supplied to Ford by Hargrave Security Service are the employees of Hargrave, focussing in particular on the question of "intention", and the "perception of the employees". In his decision, however, Mr. MacDowell took care to note that he had before him the situation where Ford had found it appropriate to subcontract this work only in connection with a construction project that it was in the process of carrying out, and thus a situation (noted at page 143) which was:



one of continuous evolution and change in both the level and nature of the services which Hargrave was required to provide. These changing circumstances called for continuous contact and communication between Ford and Hargrave personnel. In this respect, the situation may be quite different from one in which an outside contractor provides plant protection services to an established industrial plant. For this reason, I expressed some doubt to the parties as to the applicability of my award should Hargrave continue to be retained to provide plant protection services when the two new plants go into full operation. The context would be entirely different.

With those cases in mind, therefore, we turn to a consideration of the present facts. As noted earlier, the Board's Head Office has an Information desk at the front, and that desk has always been staffed by an LCBO employee. The position on the day shift has been staffed for years by Glen McKinnon. Mr. McKinnon goes off at 3:30, and another LCBO employee takes over until 11:15 p.m. That second employee (classified as a "watchman" under the collective agreement) sits at the Information desk until the building is locked at 4:45. The employee is then responsible for making the rounds to the key stations, as well as dealing with any deliveries. Mr. Alex Milton, the LCBO building superintendent in charge of maintenance and security, testified that prior to his arrival on the scene the same duties were carried out on the third shift by an LCBO employee as well. Mr. Milton is not aware of



the reason for changing to the Canadian Corps of Commissionaires, but understands that position had in fact been filled by a Corps Commissionaire once before many years ago. Mr. Milton testified that he himself is responsible for supervising the two LCBO employees, but not the Commissionaire. He acknowledged, however, that the Commissionaire is required to fill out a daily report, which Mr. Milton himself reviews. There is also a tape which records the trips to the key stations, and Mr. Milton's foreman reviews that tape each day. If the LCBO had a problem, they would complain to the Corps about the service - not about the individual, Mr. Milton states - and it would be up to the Corps to decide what to do about it. Mr. Milton acknowledges in reading the contract with the Corps (supra), however, that Article 2.8 gives the LCBO the right to insist that a particular individual be removed. Mr. Milton states that it is up to the Corps to train new people, but is unaware of what that training might consist of, and acknowledges that it is Mr. McKinnon who performs the orientation of new Commissionaires into the LCBO workplace. Mr. Milton further testified that there is a corporal who makes the rounds of Corps customers and "supervises" the Commissionaires, but he is not aware how often that corporal is actually at the premises (Mr. Milton is present only for the day shift). On the few occasions when Mr. Milton does see the corporal (inspector), the corporal will ask "Any problems?" and





Mr. Milton will say "No". That same corporal submits the weekly report of the Commissionaire's hours, and Mr. Milton approves it. Mr. Milton has only limited knowledge of the comparative overall pay requirements between LCBO employees and those for the Commissionaires, but indicated the hourly rate itself for a watchman under the collective agreement was at that time 11 something an hour, while the rate paid to the Corps for its Commissionaire appeared to be \$7.26.

The contract itself between the Corps and the LCBO is that contained in a Standing Offer to the government filed with us and dated March 12, 1986, and provides, in its material parts:

- 2.6 That the Commissionaires shall be and remain employees of the Corps, which shall be solely responsible for the arrangements of reliefs and substitutes, pay, supervision, training, discipline, unemployment insurance, liability insurance, Canada Pension Plan contributions, Worker's Compensation Board payments, leave, uniforms, and all other matters arising out of the relationship between Employer and Employee.
- 2.7 That the Corps shall be liable for all injuries to persons and for damage to property caused by their operations and their employees engaged on all operations in connection with the contract, and they shall indemnify and save harmless the Ministry of Government Services or other Ministry or Agency of the Government of Ontario from all suits and actions for



damages and costs to which the Ministry of Government Services or other Ministry or Agency of the Government of Ontario may be put by reason of injury or death to persons, and damage to property of the Government of Ontario and others, resulting from negligence or carelessness, in the performance of the assigned and agreed upon duties as outlined in para 2.9.

- 2.8 That in the event of a Commissionaire being considered by a Ministry or Agency to be unsatisfactory for any reason, the Regional Headquarters shall be notified in writing or by telephone giving reasons, and the Commissionaire so reported shall be removed, immediately if necessary, and replaced as soon as possible.
- 2.9 That the client Ministry or Agency will be responsible for giving instructions with respect to the routine, type, extent, and method of execution of duties to be performed, with the time consumed in such instruction to be paid for at the agreed rates herein.
- 2.10 That the Commissionaires provided by the Corps under this Standing Offer shall be regularly enrolled members of the Corps and considered by the Corps and the Ministry of Government Services to be physically and mentally fit to perform the duties required of them.
- 2.11 That all Commissionaires will wear the proper dress of the Corps and conduct themselves with dignity and decorum while performing their functions.
- 2.12 This Standing Offer will remain in effect for the period April 1, 1986 to March 31, 1987. In the event of the passing of any Federal and/or Provincial Legislation affecting minimum wages, vacation pay, or employer contributions during the period of this offer, rates will be reviewed and may be adjusted with the approval of the Purchasing Services Branch, Ministry of Government Services.



Any adjustment caused by a change in the minimum wage will only be considered when the minimum wage resulting from new legislation promulgated during the life of the Standing Offer exceeds the basic wage of any Member Corps thereof.

RATES - See Appendix 1

3.1 "Regular" rates will apply for all hours worked seven days and nights weekly, with the exception of Provincial Holidays, to a maximum of 44 hours per week. Fractions of hours worked shall be counted in computing the basic 44 hours per week and shall be paid on a proportional basis at the appropriate rates.

3.2 In computing the basic 44 hours per week, hours worked on a Provincial Holiday shall not be included.

Hours worked and paid-for at "Overtime" rates shall not be used in computing the basic 44 hours per week.

Hours worked due to lateness of or lack of regularly scheduled relief personnel shall not be used in computing the basic 44 hours per week.

Hours used in computing the basic 44 hours per week shall not be carried over or averaged over a period exceeding fourteen (14) calendar days of two consecutive work-weeks which shall be specified by the client Ministry or Agency.

3.3 "Overtime" equal to  $(1-1/2)$  one and one-half of the regular rate will be paid for the time worked in excess of 44 hours per week by an individual on the same particular assignment.

3.4 The Corps will schedule relief personnel in such manner as to minimize situations wherein the payment of "overtime" rates becomes necessary.





- 3.5 "Provincial Holiday Worked" rates will apply for all time worked on the following days:

New Year's Day  
Good Friday  
Victoria Day  
Canada Day  
August Civic Holiday  
Labour Day  
Thanksgiving Day  
Remembrance Day (Under Review)  
Christmas Day

Where a Commissionaire works on one of the above Provincial Holidays, a rate equal to 2-1/2) two and one-half times the regular rate will be paid to a maximum of eight hours.

Further, when a building of the Ontario Government is closed and Commissionaire services are not required on any of the above Provincial Holidays or Civic Holidays, the regular Commissionaire who does not work on that day will be paid a rate equal to his/her regular rate, to a maximum of eight hours provided conditions in the current Employment Standards Act have been met.

Rates will not be paid where a Commissionaire does not work and an alternate Commissionaire is recruited and paid (2-1/2) two and one half times the regular rate.

- 3.6 Where the client Ministry or Agency requests Commissionaires of higher rank, "Additional Billing" rates will be added to the basic rates as shown for the persons supplied.
- 3.7 Where the client Ministry or Agency requests the services of a Commissionaire at a site or location at isolated posts and where no public transportation is available, the Regional Headquarters of the Corps will negotiate any commuting expenses with the Client Ministry or Agency.



Further, any special allowance requested by the Corps for use of a Commissionaire's personal vehicle while on duty, will be negotiated with the Client Ministry or Agency and the Regional Headquarters of the Corps.

- 3.8 Where the client Ministry or Agency requests the Corps to provide additional equipment, rates will be negotiated with the Regional Headquarters and added to the basic rates shown.

The provisions with respect to adjusting rates in the event of statutory wage increases, and to overtime and other premium pay, and the constraints on scheduling in order to avoid overtime, are interesting, insofar as they underscore the extent to which the real burden of remuneration falls directly upon the Ministry using the service. In that regard the Ontario Labour Relations Board in Sylvania Lighting Services, [1985] OLRB Rep. June 1173, commented at page 1175:

13. In this case, it is not necessary for us to review in detail all of the facts elicited by the parties. We are satisfied that the day to day control of the employees' working lives rests with the respondent, and not Manpower. The respondent decides where those employees will work, who they will work with, what work they will perform and whether they will work overtime. Manpower is primarily a payroll service for the respondent, who pays Manpower a rate calculated on the hours worked by the employees it supplies to the respondent. The respondent must also pay a premium for employees who work overtime and must also pay any increase in the wage rates that Manpower pays to those employees. Manpower does not supervise, train or evaluate the employees' performance. The



employees in dispute are fully integrated into the respondent's operations. Their work responsibilities and reporting procedures are indistinguishable in all material respects from the respondent's other employees. We are therefore satisfied that the respondent is, for purposes of the Labour Relations Act, the employer of the persons who are supplied to it by Manpower.

Here the contract itself gives the government agency the explicit right to provide the instructions with respect to "the routine, type, extent, and method of execution of duties to be performed", and there is no evidence of any significant degree of supervision of the guard by anyone thereafter other than through the monitoring of reports and tapes by LCBO management, together with their right to complain (and even insist on an immediate replacement) if they are dissatisfied "for any reason". The sole function of the Corps of Commissionaires appears to be to provide individuals, in uniform, at the level requested by the LCBO, and to handle the payroll transactions consequent upon the number of hours consumed in the execution of the duties assigned by the LCBO. That, on the basis of the wide body of case law already in existence on this issue, falls far short of establishing the Canadian Corps of Commissionaires as the "true employer" of the security guards it currently is supplying to the LCBO. Rather, the Tribunal must on the evidence before it find and declare that the Liquor Control Board of Ontario is the employer of the person or persons currently being supplied to it by the Corps to perform security-guard functions at its premises at 55 Lakeshore Road East.





We turn now to the "temporary" office staff being utilized by the two Boards at their Head Offices, either from the government's internal G. O. Temporary Program, or from external agencies. As indicated previously, the prospect of calling first-hand evidence of the circumstances surrounding each and every instance in which a temporary person was used by one of the Boards was daunting, and the parties co-operated in having one Human-Resource person from each Board provide an overview of the usage, as well as give evidence of each specific instance on the basis of notes supplied to them by department managers. For the LLBO the evidence was given by Mr. Gil Harmer, who has been the Board's Personnel Manager since April of 1985, and for the LCBO by Mr. Bob McDougall, who has been Staff Relations Officer for that Board for the past 15 years.

Dealing first with the Liquor Licence Board of Ontario (LLBO), it might be noted that Mr. Harmer, when he arrived, made a conscious decision to use "GO-Temps" (i.e., employees of the Government of Ontario Temporary Employment Program) for his temporary and casual staff needs, rather than drawing from outside agencies. That, he indicated, was a policy decision that he made on his own (having been heavily involved with the Go-Temp Program while working for the



Ministry of Health in London), although he was, he adds, specifically reminded by the Civil Service Commission that that was not the only source of temporary help available. What outside agency staff do show up in the Summary prepared for this proceeding (and there are only a few) are simply "hold-overs" from the period preceding Mr. Harmer's arrival. In any event, Mr. Harmer testified, and the Summary bears out, "casual" staff from either source have been used by the LLBO in essentially the same way: replacements for approved leaves such as sickness and maternity; short-term peaks in the work load (usage of one to two weeks' duration is not infrequent); special projects, such as revamping the filing system; and covering for vacancies pending the final decision on a posting. The latter use of Go-Temps, in fact, became of particular significance in the period surveyed (January 1985 to early 1987) when the Permit and Licensing Branches were being amalgamated. That amalgamation was delayed as to its final completion for a variety of reasons, and ended up being in the works for some two years. During that period the Board was reluctant to do any hiring for the affected areas, because it had not been decided what the final re-organization, and consequent staff complement, would look like. Apart from the concern over hiring and potentially laying off shortly thereafter, Mr. Harmer testified that he was also anxious to leave some retraining spots open for staff, such as those



handling the "age of majority" cards, whose future was uncertain. Thus the decision was made to cope with the existing workload in those areas by means of Go-Temp employees.

In a general vein, Mr. Harmer testified that the practice in dealing with all of these temporary vacancies was to first look within the organization to see whether appropriate staff might be available. What frequently was required, Mr. Harmer testified, was a re-aligning of the normal job duties, so that the need for an outside person could be reduced to one of a relatively low skill level, such as straight typing. The requirements of the job would then be explained to the "Go-Temp" office at the Commission, and a selection made from the list of categories (and remuneration ranges) published by the Commission. Mr. Harmer testified that the level of salaries were, in his experience, generally higher at the Board than at the Commission, so that he could (and did) if necessary, go to a higher level of category than that of his own employee, in order to attract someone with the necessary skills without, at the same time, causing a comparative-pay problem within the department involved. Mr. Harmer acknowledged in his evidence that, as a general rule, the Board was better off obtaining as a replacement employee someone who had had experience in the area before, and indicated that the Board does on occasion submit a specific "name" request to the





Commission (although Mr. Harmer was not able to say whether any of these "name" requests had been filled). Mr. Harmer also testified that the department manager fills out a rudimentary evaluation form which is forwarded to the Board, and that if a Go-Temp appeared satisfactory, the Board might look to see whether there was a need for that person elsewhere, upon completion of the initial assignment; if there were, the Commission would then be advised of the extension and the change in duties. Similarly, the Board would also notify the Commission if a particular GO-Temp proved unsatisfactory, and in "most" cases the Board would not see that person again as a result.

The evidence of Mr. MacDougall for the Liquor Control Board (LCBO) shows essentially the same uses made of casual or temporary staff (outside the collective agreement) as at the Liquor Licence Board - except that the history of this second (and much larger) Board appears to have been to use agency personnel rather than GO-Temps. That situation has now reversed itself in the past couple of years, with agencies being resorted to only when suitable staff within the G.O. Temp Program cannot be found. Mr. MacDougall testified that the matter of temporary staff being hired directly by the LCBO and covered by the collective agreement was negotiated into the agreement around 1977, and was essentially a "store



phenomenon". Like the LLBO, the LCBO uses "casual" staff, whether obtained from GO-Temp or from outside agencies, to fill vacancies when re-organizations are pending, or new departments starting up, and the ultimate needs of the organization are not yet finalized. The start-up of a new warehouse in Durham has particularly retarded manpower planning in this regard. And again the use of such staff for temporary replacement (including vacation replacement), peak workloads (such as year-end reportings, "recall" crises) and special projects is common. The Department Head gives a description of the kind of person needed to the Recruitment branch of the Human Resource Division, and Recruitment determines whether a suitable candidate is available through secondment from within existing staff, from G.O. Temp, or from an outside agency. The selected candidate is then sent to an interview with the Department Head, who will outline the nature of the job and in the course of that discussion make an assessment of whether or not the candidate's qualifications appear suited to the job. If not, the candidate may be sent back at that time, "or at any other time". If a candidate is in fact kept and proves satisfactory, the Department Head may seek to retain him or her for a second assignment. Or the Recruitment branch may be informed of the person's availability, and Recruitment may contact another department seeking an employee and outline to them the person's skills. Casual employees may also be "name-hired" back through



the agency on occasion, and, as well, a number of agency people have gone on to become full-time employees of the Board. Particular evidence in that regard was given by Ms. Nancy Lye, who, wishing to obtain a permanent job in government, contacted a personnel agency that does a lot of business with the government. Ms. Lye was told by the agency that the government was at the time in a hiring freeze, but was advised to take a temporary position with the LLBO, through the agency, in the interim. Ms. Lye did that, and when the freeze was lifted, Ms. Lye was taken on as a full-time employee of the LLBO, doing exactly the same work for them as she had done as a "temp".

Whether dealing with G.O. Temps or with outside agency people, when one looks at the entity which makes the ultimate decision on their selection and suitability (the Boards), at the entity which assigns and supervises their daily tasks (the Boards), and at the extent to which they are integrated into the Boards' organization, one can see, in light of the authorities already referred to in connection with the Commissionaires, the argument that can (and was) put before the Tribunal in this application as to who the "true employer" is.

That issue, however, need not be decided. And that is because the Legislature has found it appropriate in any





event to exclude from the definition of "employees" covered by the Crown Employees Collective Bargaining Act:

(f) ...

- (vii) a person engaged under contract in a professional or other special capacity, or for a project of a non-recurring kind, or on a temporary work assignment arranged by the Civil Service Commission in accordance with its program for providing temporary help.

The Boards have submitted evidence of what that program of the Civil Service Commission for providing temporary help actually is. That evidence, in addition to that already recounted, is primarily in the form of a number of documents, the main one of which is an excerpt from the Ontario Manual of Administration setting out the "Policy" of the Commission (now the Human Resource Secretariat of Management Board) on "Temporary Help Service". The document provides:

#### TEMPORARY HELP SERVICE

Definition: "Temporary Help Services"

Temporary Help Services are those activities which provide:

- a) Qualified temporary help employees, as requested by ministries and agencies, through:
  - . The G.O. Temporary Program, Civil Service Commission;



- b) Similar services through:
  - . Private sector temporary help agencies; or
  - . Other sources outside the public service; and
- c) Temporary "fee for service" arrangements, where the temporary help employee must possess specialized skills.

#### Hiring and Appointment of Temporary Help Employees:

Temporary help employee are:

- . Hired by the G.O. Temporary Program, Recruitment Branch, Civil Service Commission and appointed to Group I of the Unclassified Service; or
- . Hired and paid by private sector agencies and assigned to ministries and agencies on an "as required" basis; or
- . Hired by ministries and agencies on a "fee for service" basis.

#### Use of Temporary Help Employees:

Temporary help can be used only:

- a) Where the incumbent of a classified position is absent due to:
  - . Vacation
  - . Sick leave
  - . Other leave-of-absence
  - . Inter-ministry secondment; or
- b) During an interim period when a classified position has become vacant and a replacement is being actively sought; or
- c) To augment staff during peak work-load periods.

#### Period of Employment:

Under no circumstances is a temporary help employee to be employed for more than six months, except where replacing an employee on a leave-of-absence of more than six months.

#### RESPONSIBILITY

#### ACTION

##### Ministry:

1. Prior to engaging temporary help, completes an Authority Document giving:
  - . a description of the duties to be performed;



- . the position in the classified service to be covered off or augmented;
  - . the date the employee is required; and
  - . the duration of the assignment.
2. Maintains the Authority Document in the Ministry file, preferably by "source" of the Temporary Help Service, i.e. G.O. Temporary, private agencies or other sources.

NOTE: To ensure adherence to the policy governing the use of temporary help employees, these procedures may be subject to monitoring and review by Recruitment Branch, Civil Service Commission.

\* \* \*

The Manual then goes on to elaborate further on the "G.O. Temporary Program" itself, as follows:

#### G. O. TEMPORARY PROGRAM

Definition: "G. O. Temporary Program"

The G.O. Temporary Program is an activity of Recruitment Branch, Civil Service Commission, which provides temporary help employees to ministries and agencies.

#### Appointment of G. O. Temporary Employees:

Temporary help employees provided through the G. O. Temporary Program are:

- . Hired by Recruitment Branch, Civil Service Commission; and
- . Appointed to Group I of the Unclassified Service.

#### Program Costs:

The G. O. Temporary Program is administered by Recruitment Branch, Civil Service Commission;

- . On a zero budget; and
- . With the cost of all salaries and administrative expenses charged back to ministries and agencies.





Billing:

Ministries and agencies are billed at the end of each calendar month for:

- . Gross salaries paid during the month; and
- . An administrative charge (of about 5% of the gross salary figure) which may vary slightly to adjust to actual costs.

Salaries:

Salaries are:

- . Quoted at an hourly rate; and
- . Paid weekly by the Civil Service Commission.

RESPONSIBILITY

ACTION

Ministry Personnel Branch:

1. Ensures completion and maintenance of an Authority Document giving:
  - . a description of the duties to be performed;
  - . the position in the classified service to be covered off or augmented;
  - . the date the employee is required; and
  - . the duration of the assignment.
2. Ensures G.O. Temporary, Civil Service Commission, is contacted by telephone or in writing and supplied with details of the temporary help requirement.

G.O. Temporary Program:

3. Completes an order form from information supplied by the Ministry.
4. Hires and assigns a suitable temporary employee.
5. Informs employee of the:
  - . terms of assignment (i.e. duties, hours and conditions)
  - . rate of pay
  - . supervisor's name; and
  - . time and place to report.
6. Informs Ministry of:
  - . employee's name; and
  - . rate of pay.
7. Sends required supply of timesheets to the employee's supervisor.



Ministry Personnel Branch:

8. Enters the following in Authority Document:
  - . name of employee
  - . starting date; and
  - . rate of pay.

Supervisor:

9. Signs time sheets, and by so doing confirms and authorizes the hours worked each week.
10. Distributes time sheets to:
  - . employee - one copy
  - . Ministry Personnel Branch - one copy
  - . G.O. Temporary Program - original and two copies

G.O. Temporary Program:

11. Calculates employee's deductions and pay and issues cheque.
12. Mails cheque to employee's residence weekly for the previous week's work period.

Ministry Personnel Branch:

13. Checks time sheet against Authority Document.

Further, there have been filed with us other publications of the Civil Service Commission outlining for prospective employees the terms and conditions of that program. One of these, for example, entitled "The G.O. Temporary Employment Program" begins as follows:

This booklet will help you determine if employment with G.O. Temporary is best suited to you and your particular needs. If you qualify as a G.O. Temporary employee, you will be contributing to a wide variety of projects, and through your temporary involvement, will assist the Ontario Public Service in its diversified operations.



### What is the G.O. Temporary Program?

G.O. (Government of Ontario) Temporary is an internal staffing service which was established March 1, 1968 to meet the temporary staffing needs of the various Ontario Public Service ministries, agencies, boards, and commissions (the clients).

Since its inception, there has been a constant increase in the utilization of G.O. Temporary, and the program has expanded to provide a more comprehensive service to both clients and employees. Many professional, technical and administrative employees are now registered with and assigned through the program, plus many summer students, students of Ontario Career Action Program and Co-Op Programs. Also, a special and well-utilized staffing audit and payroll service is provided for out-of-town clients.

and concludes:

### Can G.O. Temporary Employment Lead to Regular Employment?

G.O. Temporary employment is not to be confused with regular employment, or as a means of obtaining regular employment in the Ontario Public Service. However, employees of G.O. Temporary are eligible to apply to those internal competitions advertised in topical job mart (Ontario Public Service employee publications) which are prefaced with "Open". Those positions prefaced with "Restricted" will be limited to classified civil servants only. G. O. Temporary employees may apply to Ontario Public Service advertisements listed in the newspapers; they may also be interviewed and listed with the Manpower Resources Inventory, which is an activity of the Recruitment Branch, Civil Service Commission. For further information regarding the Manpower Resources Inventory, applicants may enquire at Staffing Services, 1st Floor, Frost Building South.





Consistent with the dictates of the Manual of Administration referred to above, the publication also notes:

Duration of Assignments - The duration of an assignment may vary from one-half day to several weeks; however, no assignment should exceed six months, except where the temporary employee is replacing a regular employee who is on a leave of absence of more than six months. The temporary employee is responsible for advising G.O. Temporary of assignment completion date, and next availability date.

As can be seen from the Manual, however, it is apparent that the government of Ontario (through Management Board) clearly does not consider its own internal "GO-Temp" program to be the only appropriate means of securing temporary help, and the Recruitment Branch of the Civil Service Commission in fact has issued, for example, the following memo of August 24, 1984:

August 24, 1984

MEMORANDUM TO: All Personnel Directors

FROM: W. E. Rooke  
Director  
Recruitment Branch

RE: Temporary Employment Services

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In response to frequent approaches by private sector agencies, I am enclosing a list of temporary employment services, for your information and reference.



As you are aware, it is not mandatory for ministries to use the services of G.O. Temporary.

"W. E. Rooke"  
W. E. Rooke  
Director

There is then attached to that Memo a list of external Temporary Employment Agencies in the City of Toronto. Further, the Recruitment Branch of the Commission in March of 1985 issued a memo to remind the ministries, etc. that "Go Temp" is not the only source of temporary help service available to them:

March 29, 1985

MEMORANDUM TO: Personnel Directors  
FROM: Mr. W. E. Rooke  
RE: Temporary Employment Agencies -  
Private Sector

---

Several times in the past, it has been necessary to draw to your attention and other personnel representatives, that use of the present G.O. Temporary Service is not mandatory when seeking temporary help.

As was most recently discussed at a Personnel Council meeting, there is no intention now or in the future to make G.O. Temporary the only source of temporary help for ministries, particularly in view of the wide range of available temporary services outside the Ontario Public Service.

Unfortunately, in spite of the efforts that have been made to inform public servants, we continue



to hear that some representatives involved in hiring temporary staff continue to insist that temporary employees may only be hired through G.O. Temporary Services.

Your help in correcting this misunderstanding, if it exists in your jurisdiction, would be much appreciated.

"W. E. Rooke"  
Director

We return then to the key exclusion in this application, which is set out in section 1(1)(f)(vii), and which once again excludes from the scope of the Act:

- (vii) a person engaged under contract in a professional or other special capacity, or for a project of a non-recurring kind, or on a temporary work assignment arranged by the Civil Service Commission in accordance with its program for providing temporary help.

Assuming, for the moment, that what we are dealing with are "temporary work assignments", Mr. Wahl on behalf of the applicant Union would concede that "G.O. Temps" fall within the exclusion provided by the section. But, Mr. Wahl submits, that is all that the subsection is referring to. When we look at the full program for providing "temporary help service" under the government's Manual of Administration, however, we are unable to agree. Rather, it is clear from the excerpts noted above that the Commission's program is in fact three-pronged, and that such temporary service may be provided by an employee:





- . Hired by the G.O. Temporary Program, Recruitment Branch, Civil Service Commission and appointed to Group I of the Unclassified Service; or
- . Hired and paid by private sector agencies and assigned to ministries and agencies on an "as required" basis; or
- . Hired by ministries and agencies on a "fee for service" basis.

Whichever source is chosen, however, the overall terms and conditions of the Manual, for example, with respect to both the reason and the duration of the use, apply with equal force, and the Commission continues to be involved from a monitoring point of view to ensure that these overall guidelines are adhered to. The words "arranged by" and "in accordance with its program" in subsection 1(1)(f)(vii), it seems to us, mean simply that the temporary staff, to be excluded, must be obtained in a manner specifically authorized by the Civil Service Commission (as it then was) under its policy for dealing with the matter. In fact, as the documents show, there are three sources of such staff contemplated by that policy, and the option of choosing which of the sources of temporary help will be utilized in a given case has been explicitly delegated to the Ministries and other government agencies, both in the Manual itself, and in the kinds of "reminder" memos entered before us here in evidence (although the "Commission" continues to play a role as well in assisting the client Ministry or agency to ascertain what skill levels may be available from one source versus another). To adopt the Union's narrower reading of the section



would mean that an exclusion issue of this magnitude would, as Mr. Jarvis notes, turn simply on who made the phone call to the external agency, and that, in the words of the line of cases cited earlier, would be to emphasize form over substance. We simply are unable to accept that that distinction was in the minds of the legislators when section 1(1)(f)(vii) was drawn - nor, we would add, would it appear to have been in the minds of anyone else involved with the public service over the many years that both of these forms of "temporary help" agencies have been utilized by the government. And if we were now to hold otherwise, it is apparent that the government could immediately bring itself back within the section by establishing another level of administration at the Human Resource Secretariat simply to make these calls on behalf of their clients. We do not believe, however, that that is what was contemplated, or is required.

The question in the application then becomes simply the factual one of whether the persons under challenge were employed either for "a project of a non-recurring kind", or on a "temporary work assignment", and both of those terms have been given consideration by decisions of the Tribunal in the past. In Ontario Public Service Employees Union and the Ministry of Health (Lamey), Tribunal File #T/19/77, issued May 12, 1978, Mrs. Lamey had been appointed on contract to assist in the phasing out of a Hospital's Mental Retardation



Unit. She was told at the time of hiring that her employment would be of only two or three months, and her contract reflected that. However, the phasing out of the Unit lasted longer than anticipated, and Mrs. Lamey's contract had to be extended. The Union's argument was as follows:

The union argued that Mrs. Lamey was, in effect, hired to provide custodial care for the residents of the hospital - that she was in effect employed as a nurse and that this was not a project of a non-recurring kind. The union further submitted that a project is a finite matter with a beginning and an end and that providing nursing care could not be described as a project. The union suggested that a Royal Commission or the construction of a building is the type of activity that should be considered as a project but that the delivery of nursing care as part of the hospital does not fall within that class of work or activity that could be considered as a project. The union's argument suggested that since nursing care was a part of the regular activity of the hospital, by hiring Mrs. Lamey to do that work, she became part of the regular staff of the hospital.

In addition the union submits that because Mrs. Lamey entered into a series of contracts which extended her service that even if the work could be considered as a project that it was of a recurring kind rather than non-recurring. Thus the impact of renewal negated the concept of non-recurring.

The Tribunal, however, concluded, commencing at page 6:

After considering the evidence and the arguments we are satisfied that the phasing out of the Mental Retardation Unit was a bona fide undertaking by the employer and that Mrs. Lamey





was hired with the full understanding that she was to be employed on a temporary basis while the unit was being phased out.

We are further satisfied that the scheme or plan to phase out the service was of a non-recurring nature regardless of the fact that there is not a definite termination date. The experience to date coupled with the projections and the very nature of the scheme indicate that there is a bona fide attempt to terminate the Mental Retardation Unit and that there is no expectation that the unit will be resurrected at a future date.

The remaining issue that we are confronted with is whether the phasing out was a project within the meaning of the Act. In simple dictionary terms a project is a "plan" or a "scheme" or a "planned undertaking". Clearly, in context, this attempt to phase out the Mental Retardation Unit fell within the plain meaning of the term. The phasing out operation was a plan or a scheme or an undertaking to place the residents of the Mental Retardation Unit in other surrounding where they received more appropriate treatment. The project required additional staff or supplementary staff in order that it be carried out. It is not relevant that the work is similar to work performed by other permanent or classified staff; clearly there are numerous projects which may be required by the government from time to time where the work is the same or similar to work being performed by government or classified employees. Thus in the example cited by the union of a Royal Commission, there could be office and clerical staff performing work that is performed by classified government employees. The purpose of the section is to allow the employer some latitude or flexibility in dealing with special situations without having persons appointed to work in those situations become employees for all relevant purposes.

The evidence before us does not in any substantial way raise the issue of the continuous re-employment of an



individual on "temporary" status, but the case of Ontario Public Service Employees' Union and Ministry of Colleges and Universities (Gordner), File #T/5/76, issued November 24, 1976, demonstrates that the Tribunal once again was prepared to grant considerable latitude when interpreting and applying the "temporary help" exclusion. There the Tribunal was looking at the case of an employee who had come into the Ministry as a "Go-Temp", on a knowingly temporary basis, but who was still employed in that status 2 years later. The Tribunal at page 4 wrote:

It is apparent that the needs of the Government as an employer are many and varied. Under questioning from the Tribunal the representatives of the parties conceded that there were situations that might continue for a lengthy period of time which might be considered temporary. Thus, for example, it may be necessary to appoint clerical or secretarial staff to a Royal Commission or other investigative body which is known to be of a non-permanent nature and yet the work may extend over a lengthy period of time. Persons assigned to such a project will know that their work will last for a fixed period and then terminate. The length of time of the work assignment in those circumstances will not be an indication that the work is temporary - length of time by itself is not dispositive of the issue as to whether a work situation is permanent or temporary. Each situation will depend on its particular circumstances.

We have now reviewed the voluminous evidence placed before us in this case, including the written "Summaries" of individual placements provided by the various department heads,



and are prepared to accept that those hirings can fairly be said to fall within the definition, in some cases, of a "non-recurring special project", but in any event within the natural meaning of a "temporary work assignment". As the Tribunal held in the Gordner case, supra, at page 3, the word "temporary" simply connotes "impermanent or transitory or lasting for a time only". And in fact, the Union's own attack has not really been on the basis of a case-by-case analysis of the reason for the hiring. Rather, the Union's approach has been to attempt to provide an "overview" of the situation, and has, through the use of charts isolating particular categories of employees ("data-entry processors", "clerk typists", etc.), attempted to link up the many short-term assignments occurring across the various departments of the Boards in order to demonstrate that the need for at least a minimum number of such employees somewhere in the Boards, whether from GO-Temp or outside agencies, is continuous. The Union argues from there that such needs, particularly as replacements for employees absent due to vacation, sick leave, secondments, etc., are predictable from year to year, and that the Boards ought therefore to be required to instead hire a pool of full-time employees in those numbers and to fill its replacement and other needs from that pool as required. In support of this argument, that such needs of the Boards, because of their ongoing and foreseeable nature, are not really "temporary", the Union relies in particular on the Canada Labour Relations





Board's decision in Bank of Montreal, reported at [1987] CLLC ¶16,044, where the Board commented, at page 14,335, that:

Casual employment is therefore the product of a given employer's unforeseen need to have work performed and the chance, random and voluntary availability of a given employee.

Those observations of the Canada Board, however, were made in the context of drawing a distinction between "casual" employees, and "regular" part-time ones, for the purpose of community of interest and the composition of an appropriate bargaining unit. The following subsequent passage, for example, more clearly indicates the distinction that the Canada Board in that case was concerning itself with:

The potential employee who approaches an employer and guarantees it that he/she will be available at any time to perform any work made necessary by the absence of regular employees is not a casual employee, but a part-time employee.

It is the view of the Tribunal, therefore, that those comments of the Canada Board are of limited assistance in the context now before us, and we consider, once again, the definition set out by the Tribunal in Gordner of "impermanent or transitory or lasting for a time only" as the more natural meaning to be adopted in the context of section 1(1)(f)(vii). In arriving at that conclusion, we note as well the amendment



made in the late 1970's to section 1(1)(f)(vi) of the Act, which at the time of Gordner read:

[(v)] a person who is employed on a casual or temporary basis unless he has been so employed continuously for a period of six months, or more,

and which now, once again, reads:

(vi) a person not ordinarily required to work more than one-third of the normal period for persons performing similar work except where the person works on a regular and continuing basis.

It is not obvious from the face of the amendment alone, however, what the purpose of the legislators may have been, and the re-defining of terms may have been no more than recognition of the fact that casual staff coming from GO-Temp or outside agencies were covered in any event by the broad exclusion for temporary help services under (vii) (including the 6-month standard limitation on hiring imposed by Management Board); whereas section (vi) as amended may have simply been designed to provide an additional level of exclusion for persons in fact hired directly as "employees", but whose attachment was so minimal as to be considered more in the nature of "casuals". Certainly there is nothing before us by way of evidence indicating that anyone on either side of government appeared, by their conduct, to consider the amendment to have had any



greater impact than that on the existing scheme of "temporary" exclusions.

Putting aside whatever other problems may arise from the point of view of suitable qualification and experience match-ups (even accepting the relatively low skill-level involved generally) and of co-ordination of this cross-department "link-up" approach of the Union, therefore, the fact is that the Boards have instead determined to meet these needs by what we find to have been "temporary work assignments", in exactly the way that appears to have been contemplated by section 1(1)(f)(vii). As Mr. Jarvis observes, that section itself identifies the kind of "pool" arrangement that has been set up to accommodate these casual or temporary needs, except that the system operates on a government-wide basis.

The decision of the legislators to grant that exclusion from the Act does not, of course, prevent the parties from continuing to attempt to find sensitive, sophisticated ways of accommodating each others' concerns in this area of temporary or casual hirings - as the present case has managed to produce in the case of the warehouse - and failing that, the issue we gather from the parties is one that has already been placed before an interest board of arbitration as well. In terms of the present application, however, we must find:





- (1) that the person or persons currently being hired through the Canadian Corps of Commissionaires as night security guards are employees of the Liquor Control Board of Ontario and hence "employees" for the purposes of the Crown Employees Collective Bargaining Act;
- (2) that the remaining persons before us in the present application are employed on projects of a non-recurring kind or on temporary work assignments in accordance with the [former] Civil Service Commission's program for providing temporary help, and are not "employees" for the purposes of the Crown Employees Collective Bargaining Act, by virtue of section 1(1)(f)(vii) of that Act.

It is therefore not necessary to consider the employer's additional argument under section 1(1)(f)(vi) with respect to certain persons in that latter grouping.

DATED AT TORONTO THIS 30th DAY OF March , 1989.

  
M. G. MITCHNICK - ALTERNATE CHAIRPERSON

"I Dissent Partially" (Partial Dissent attached)  
E.C. WITTHAMES MEMBER

"I Dissent" (Dissent attached)  
R.M. DRENNAN MEMBER



THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT

R.S.O. 1980, c.108

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL  
(T/0019/85)

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PARTIAL DISSENT

It is with some regret that I find it necessary to partially dissent after several readings of the Chairperson's decision in the matter of T/0019/85).

My dissent is not with the Chairperson's findings because those findings are, without providing or applying latitude, clearly supportable under the existing Crown Employees Collective Bargaining Act.

The Crown Employees Collective Bargaining Act is void of affirmatives in some sections. In fact, the wording of some sections seems to deliberately create problems. At Page 51 of the Chairperson's writings he refers to "the minds of the legislators when section 1(1)(f)(vii) was drawn up". Section 1(1)(f)(vii) states:-

"(vii) a person engaged under contract in a professional or other special capacity, or for a project of a non-recurring kind, or on a temporary work assignment arranged by the Civil Service Commission in accordance with its program for providing temporary help."

For anyone to draft the foregoing legislation required a blindness towards the purpose and intent of the C.E.C.B.A. By including the infamous sub-section (vii), they provided not just one window but a window on every wall for exclusions.

" a person engaged under contract in professional or other capacity, ---- or for a project of a non-recurring kind, ---- (and then the creme-de-la-creme) ---- or on a temporary work assignment arranged by the Civil Service Commission in accordance with its program for providing temporary help."



Not only does the Ministry have an established G.O. Temporary Program which provides temporary help employees to Ministries and Agencies, but as the record shows, Director W.E. Rooke stated to all Personnel Directors - March 29, 1985:-

"As was most recently discussed at a Personnel Council meeting, there is no intention now or in the future to make G.O. Temporary the only source of temporary help for ministries, particularly in view of the wide range of available temporary services outside the Ontario Public Service."

So the L.C.B.O. or L.L.B.O., could, in complete disregard of the Recognition Article developed from the original certification which is now an integral article in the Collective Agreement, operate through any one of the windows provided by the architects of sub-section (vii).

It became not a question of what is the moral responsibility in view of the agreed terms in the Collective Agreement. The Employer read the sub-section (vii) and saw a window of escape that he could, in wild abandonment, hire temporary help almost forever to fill a vacuum created by a need for more employees in the basic office skills.

The Union clearly showed there could be, in fact there were, temporary employees (defined by the very existence of sub-section (vii) outside the Act) performing office and clerical work the same as employees covered by the Agreement and include under the Act. All this taking place under L.C.B.O. or L.L.B.O., supervision at normal everyday work stations.

In T/19/77, Ontario Pubic Service Employees Union and the Crown in the Right of Ontario (Ministry of Health) re: Mrs. Lucie Lamery, at Page 7, Owen Shime described what is now sub-section (vii) as a provided flexibility:-

"The purpose of the Section is to allow the employer some latitude or flexibility in dealing with special situations without having persons appointed to work in those situations become employees for all relevant purposes."





The Employer, L.C.B.O. or L.L.B.O., took full advantage of the latitude and flexibility by calling at will, for temporary help to fill vacancies.

Owen Shime went on to say in the same case:-

"That does not mean as was suggested by the Union that the employer is free to create situations and appoint people to work in those situations in a manner that detracts from their true status as employees. But each case will have to be decided on its own particular merits."

It appears to this member that sub-section (vii) does not permit the Tribunal to look at the merits. As said earlier, the window is wide open. There is no doubt in this member's opinion that the employer in this case was avoiding the status of employee(s) by using sub-section (vii) as a crutch. The employer did not need to create a situation, it just filled vacancies with temporary help as the need arose.

In 1976, Owen Shime dealt with the hiring of G.O. Temporary employees and he took a very stern approach in Ontario Public Service Employees Union and the Crown in Right of Ontario represented by Management Board of Cabinet Ministry of Colleges and Universities). He obviously saw the need for a curtailment to what could, and in current case did, become a regular feast for the employer wanting to avoid the agreed terms of the negotiated contract, and I quote from Owen Shime:-

"On the other hand, it is not open to the employer to merely arrange a work assignment through the Civil Service Commission and deem it temporary and in that way circumvent the provisions of The Crown Employees Collective Bargaining Act which grants collective bargaining to employees of the Crown. The employer by that method cannot unilaterally designate persons to fall outside of the ambit of collective bargaining; it cannot exclude the applicant or others from being employees in the bargaining unit merely by arranging their work assignments through the Civil Service Commission or an arm of that Commission such as G.O. Temporary."



Later in his same writings he went on to say:-

.... "thus, a work assignment to a position for a period in excess of 12 months coupled with a failure to explain the circumstances surrounding the nature and extent of the assignment may constitute prima facie evidence that the assignment or position is not temporary."

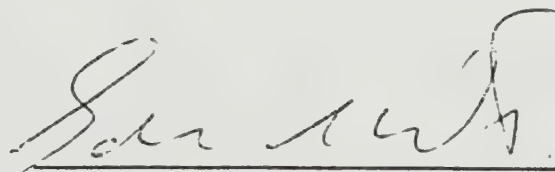
The C.E.C.B.A. is the authority to provide Collective Bargaining to employees of the various government departments. It stipulates the rules under which both sides must operate in their bargaining relationships.

It appears to this member that the government at the time, though agreeing to accept the bargaining rights of a group of employees, was determined not to allow the union clear access to the work force. They were, by the mere existence of section 1(1)(f) (vii), G.O. Temporary, and other such agencies always protecting themselves from total union members in the bargaining unit. Such provisions could sap the bargaining unit's real strength.

In this member's opinion, though I must accept partially the Chairperson's award and though that award is most carefully researched and well written, it falls short of exposing the real gaping window provided an employer who wants to circumvent the true intent and spirit of the Collective Agreement.

For the following reasons, I must partially dissent with the Chairperson and my colleague.

Dated at Toronto, Ontario this 3rd day of January, 1989.



Edward C. Witthames  
(Panel Member) (Union)



## D I S S E N T

I have read the Order of the Tribunal in this matter and I dissent with Item 1 and concur with Item 2.

Reason for dissent: I object to employees of the Corp. becoming members of the union as I think this sets a dangerous precedent for the Corps. It must be underlined that the Corps. has many small units of Commissionaires throughout Ontario and Quebec, if not throughout Canada, most of whom are working for private enterprise and are not members of a union.

Picture a lay-off situation where seniority prevails. These men would be the first to go, and not withstanding their advancing years, would have to forego their "modest" earnings which I understand is really a supplement to a pension or is designed around such a concept.

I think that there might even be a case for discrimination under our human rights legislation in order to avoid a situation whereby these "seniors" are protected under the terms in which they were hired by the Corps.

R. M. Drennan









BETWEEN: ONTARIO PUBLIC SERVICE EMPLOYEES UNION

Applicant

- and -

THE CROWN IN RIGHT OF ONTARIO  
(Ministry of Treasury & Economics)  
and Teachers' Superannuation Commission

Respondent

Determination

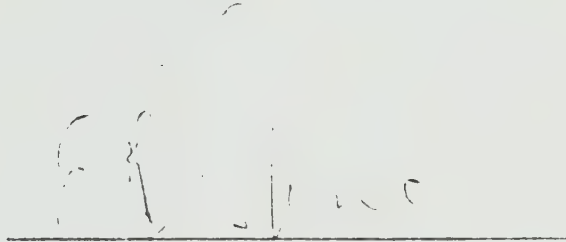
1. This is an application for certification. The Tribunal finds that the Applicant is an employee organization within the meaning of Section (1)(1)(g) of the Crown Employees Collective Bargaining Act, R.S.O. 1980, c.108.
2. Having regard to the agreement of the parties, the Tribunal determines that "all employees of the Teachers' Superannuation Commission save and except Supervisors, persons above the rank of Supervisor, secretary to the Director and personnel clerk," constitutes a unit of employees that is appropriate for collective bargaining purposes under the Crown Employees Collective Bargaining Act, R.S.O. 1980, c.108.

The Tribunal notes the agreement of the parties that the status of the position of secretary to the Manager, Benefits Department, currently occupied by Catherine Riddell remains outstanding and remains to be determined by the Tribunal.



3. On the taking of the representation vote more than 50% of the ballots cast were in favour of the Applicant and accordingly, the Tribunal hereby grants representation rights to the Applicant as the bargaining agent of the employees in the aforesaid bargaining unit.

DATED at Toronto, Ontario this 13th day of February, 1986.

A handwritten signature in dark ink, appearing to read "O. B. Shime", is written over a horizontal line.

O. B. Shime, Q.C.  
Chairman











Ontario Public Service

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416-596-0686

T/0021 '85

Crown Employees Collective Bargaining Act,  
R.S.O. 1980, c. 108

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

BETWEEN:

Canadian Union of Public Employees  
Local 3096

Applicant

- and -

The Crown in Right of Ontario  
(North Waterloo Housing Authority)  
(Ministry of Housing)

Respondent

BEFORE:

J.H. Devlin, Vice-Chairman  
M. Sullivan, Member  
J.H. McGivney, Member

FOR THE APPLICANT:

J. Lynd  
Administrator  
Canadian Union of Public Employees  
Local 3096

FOR THE RESPONDENT:

J. Sanderson, Esq.  
Sanderson, Laing  
Barristers and Solicitors

HEARING DATE:

December 8, 1986



The issue, in this case, concerns the status of three individuals who perform maintenance work for the North Waterloo Housing Authority. It is the position of the Union that these individuals are employees within the meaning of the Crown Employees Collective Bargaining Act, whereas it is the position of the Housing Authority that they are not employees but instead are independent contractors.

The parties provided the Tribunal with an agreed Statement of Fact on the understanding that each was at liberty to adduce additional evidence in support of its position. The agreed Statement of Fact is to the following effect:

"

...

1. In this statement of facts, the three individuals in question will be referred to as 'Maintenance Handymen'.
2. The three Maintenance Handymen are:
  - a) Larry Brown
  - b) Gordon Meredith
  - c) Douglas Spitzer
3. Each of the three Maintenance Handymen started providing services to the North Waterloo Housing Authority on the following dates:
  - Larry Brown - January 1978
  - Gordon Meredith - September 1978
  - Douglas Spitzer - January 1980
4. Each of the three Maintenance Handymen does a significant portion of his work within one area of the city. However, over the course of a year, each of the Handymen will perform work in





most, if not all of the Ontario Housing Corporation projects managed by the Housing Authority.

5. Work performed by the Maintenance Handymen includes, but is not limited to, the following:
  - Replacing laundry tubs and taps as well as bathroom and kitchen taps.
  - Replacing toilet seats and paper holders.
  - Replacing floor tiles; regrouting and replacing ceramic tile.
  - Repairing toilets.
  - Replacing pressure relief valves on hot water tanks.
  - Repairing/caulking counters.
  - Repairing and replacing closet doors.
  - Repairing and replacing door locks.
  - Cleaning units on move-outs.
  - Replacing switch plates, light shades, bulbs and curtain track rollers on move-outs.
  - Replacing/adjusting weatherstripping in units.
  - Installing new washers in taps.
  - Replacing units screens, windows.
  - Repairing damaged drywall.
6. Work is prioritized for the Maintenance Handymen by a Maintenance Supervisor of the Housing Authority on the following basis:
  - Urgent: Must be done at once
  - Important: Should be done as soon as possible
  - Routine: To be completed within a reasonable period of time.



7. The contact of the three Handymen and the Housing Authority is through the Maintenance Supervisor, of which there are three, and such contact occurs on the following basis:

- Larry Brown: Comes to the office on an average of three times a week and calls in daily.
- Gordon Meredith: Rarely comes to the office, but calls in daily.
- Douglas Spitzer: Comes to the office daily.

Each Handyman establishes his own work methods and schedules his own hours of work.

8. The Maintenance Handymen currently receive \$13.00 an hour from the North Waterloo Housing Authority for the performance of services requested by the Housing Authority.
9. No benefits are provided to the Maintenance Handymen.
10. The fixed per hour amount paid to the Maintenance Handymen is reviewed annually.
11. In order to derive the benefits of volume buying, all materials required by a Maintenance Handyman in the performance of services for the Housing Authority, would be provided to the Handyman by the Housing Authority."

In addition to the Statement of Fact, oral evidence was given by Douglas Spitzer and Gordon Meredith, two of the three Maintenance Handymen. Evidence on behalf of the Housing Authority was given by James Thompson, the Housing Manager and by Edward May, the Maintenance Manager. This evidence reveals that the Housing Authority employs three Maintenance Supervisors, each of whom reports to Mr. May and each is responsible for a particular geographic area within the Housing Authority's



jurisdiction. One Handyman is assigned to each Maintenance Supervisor. In the past, Handymen have generally been referred to the Housing Authority by individuals within the community and, as a consequence, advertisement for these services has been unnecessary. While the Ontario Housing Corporation and some individual housing authorities employ maintenance repairmen as members of the bargaining unit, the North Waterloo Housing Authority has contracted out minor maintenance work to Maintenance Handymen since at least 1972. The number of Handymen retained by the Housing Authority has fluctuated with there being a maximum of three to four at any given time. The type of work performed by the Handymen which is outlined in the agreed Statement of Fact has basically remained unchanged since 1972 although there has been an increase in the volume of the work to be performed.

When the services of a Handyman are retained, he is required to execute a standard form contract by which he agrees to work for the Housing Authority in the capacity of Maintenance Handyman performing maintenance jobs allocated on a "as called basis". The Handyman agrees to provide workers' compensation and public liability insurance and to provide the necessary tools and transportation to perform the duties assigned to him. The agreement further provides that the Handyman will be compensated at an hourly rate inclusive of insurance, tools and vehicle. As indicated in the agreed Statement of Fact, Handymen are presently





compensated at the rate of \$13.00 per hour. This is a gross sum and each Handyman is then responsible for his own remittances and deductions. While the rate is reviewed annually, Mr. Spitzer and Mr. Meredith testified that there is little in the way of negotiation and Mr. Thompson testified that the Handymen meet with Mr. May every year and are simply advised of the rate which will be paid for the upcoming year.

Requests for the type of maintenance work performed by Messrs. Brown, Meredith and Spitzer are received by the Housing Authority from tenants in approximately 38 projects managed by the Housing Authority. A work order is prepared in respect of the work to be performed which is signed by Mr. May and then allocated to the Maintenance Handymen on the basis of the location of the work to be performed and the Maintenance Supervisor responsible for the particular area. The Maintenance Handymen are advised of the work to be performed either by telephone or by attending at the Housing Authority office as outlined in the agreed Statement of Fact. Work is prioritized by the Maintenance Supervisor and if the work is specified as routine, the Handyman may perform the work at his discretion, provided this is done within a reasonable period. If the work is urgent, the Maintenance Supervisor may advise the Handyman that it is to be completed immediately and if this necessitates work on a weekend, the Handyman continues to be compensated at the rate of \$13.00 per hour.



Mr. Thompson testified that Maintenance Supervisors are required to check the work of Maintenance Handymen on a regular basis. In the event that a Handyman encounters difficulty with a particular assignment, he contacts the Maintenance Supervisor and obtains instructions as to how to proceed. If the work is not performed in an acceptable manner, the Handyman may be sent back to carry out the necessary repairs at his own expense. It would appear that Mr. Meredith has never been required to redo work at his own expense and that Mr. Spitzer has only been required to do so on one or two occasions. Mr. Thompson testified that if a Maintenance Handyman were to regularly perform work which was unacceptable to the Housing Authority, his contract would be terminated and that, in fact, this has occurred in the past.

As indicated in the Statement of Fact, materials required for the work performed by Maintenance Handyman are provided by the Housing Authority which derives the benefit of volume buying. Handymen often pick up materials directly from a hardware store using a purchase order number provided by the Housing Authority. Each Handyman is responsible for providing and maintaining a basic set of tools although Mr. Thompson testified that if major tools are required, these are generally provided by the Housing Authority.



When a job is completed, the Handyman records the hours spent and prepares an invoice which he forwards to the Housing Authority. Each Handyman is remunerated bi-weekly and Mr. Spitzer and Mr. Meredith testified that the cheques are made out to each of them personally.

Mr. Meredith has worked exclusively for the Housing Authority since 1978 while Mr. Spitzer estimated that approximately 85 to 90 per cent of his time is spent working in this capacity. The remainder of his time is spent in maintenance work for private residential customers, many of whom are known to him personally. Although Mr. Spitzer does not have employees at the present time, he testified that, in the past, he has hired students in the summer on a part-time basis. While Mr. Thompson testified that there is no restriction on the amount of work which the Maintenance Handyman may perform for others, he acknowledged that the services of Handymen have been terminated in the past where they have not been readily available to perform the work required by the Housing Authority.

Mr. Spitzer testified that he generally works eight to ten hours per day with the exception of the Christmas period when there is a reduced demand for his services. Mr. Meredith testified that he regularly works eight hours per day, Monday to Friday and although there is some weekend work, this is rare. Mr. Meredith and Mr. Spitzer both advise the Maintenance





Supervisor in the event of vacation. Mr. Thompson also testified that it is necessary for the Housing Authority to be advised of vacation in order that arrangements may be made for another Handyman to perform the necessary maintenance work.

The issue, then, is whether Messrs. Brown, Meredith and Spitzer are independent contractors or whether they are employees within the meaning of the Crown Employees Collective Bargaining Act. Perhaps the earliest and most well-known test for differentiating between an employee and an independent contractor can be found in a decision of the Privy Council in Montreal v. Montreal Locomotive Works Ltd. et al. [1947], 1 D.L.R.161. There Lord Wright enunciated the fourfold test which requires a consideration of the following factors: 1) control; 2) ownership of tools; 3) chance of profit and 4) risk of loss. This test, however, is not to be applied mechanically and as noted in Re United Automobile Workers, Local 1566 and Wean-McKay of Canada Ltd., (1972) 23 L.A.C.27 (Palmer), the factors must be considered in the context of the particular circumstances of each case:

"

...

In many situations this test has been applied in an extremely rigid form. It is clear, however, that this was not the intention of Lord Wright at the time. The approach taken in Baron Dry Wall Ltd. (1965), 65 CLLC, para. 16,029 (O.L.R.B.) is preferable. There Weatherill stated that: 'the application of criteria such as these [in Lord Wright's test] is in no sense a mechanical



operation: the significance of these factors must inevitably be established in relation to the circumstances of each case.'

..."

More recently, in Mayer v. J. Conrad Lavigne Ltd. (1979), 27 O.R.(2d)129, the Ontario Court of Appeal suggested that the fourfold test has been enlarged by the "organization test" as the appropriate means of differentiating between an employee and an independent contractor. Referring to the fourfold test enunciated in Montreal v. Montreal Locomotive Works Ltd. et al., supra, Mr. Justice McKinnon stated as follows:

"...This test has been enlarged by the more recent 'organization test' which was approved and applied by Spence, J., in Co-operators Inc. Ass'n v. Kearney (1964), 48 D.L.R.(2d)1. In that case (pp. 22-3), he quoted with approval the following passage from Fleming, The Law of Torts, 2nd ed. (1961), at pp. 328-9:

'Under the pressure of novel situations, the courts have become increasingly aware of the strain on the traditional formulation [of the control test], and most recent cases display a discernible tendency to replace it by something like an 'organization' test. Was the alleged servant part of his employer's organization? Was his work subject to co-ordinational control as to 'where' and 'when' rather than the 'how'? [citing Lord Denning in Stevenson, Jordan & Harrison Ltd. v. Macdonald, [1952] 1 T.L.R. 101, 111.]'

Lord Denning in Stevenson Jordan & Harrison, Ltd. v. MacDonald et al., [1952] 1 T.L.R. 101, referred to by Fleming, said this:

'One feature which seems to run through the instances is that, under a contract of service,



a man is employed as part of the business, and his work is done as an integral part of the business; whereas, under a contract for services, his work, although done for the business, is not integrated into it but is only accessory to it.'

..."

It also useful to consider jurisprudence developed by the Ontario Labour Relations Board to determine whether an individual is an employee for purposes of the Labour Relations Act. In Algonquin Tavern [1981], OLRB Rep. Aug. 1057, the Board enunciated a series of factors which have been relied upon to support a finding that an individual is an independent contractor rather than an employee. After reviewing a number of authorities, the Board commented as follows:

"64 From this survey of the legal landscape, and the special environment of the entertainment industry, we can now attempt to distil some of the features which individually (sic), or in combination, have been relied upon to support a finding of independent contractor status. It is recognized of course, that a listing such as this must necessarily be somewhat artificial. The factors are interrelated, and one is often only the converse of the other. No one factor, in itself, will be significant. However, all of these matters were mentioned or relied upon in one or more of the cases to which we have already referred and, if present, support a finding that an individual is 'self employed':

1. The use of, or right to use substitutes. It has been considered inconsistent with an employment relationship if one could fulfill the bargain with someone else's labour rather than one's own work and skill. This is significant, however, only to the extent





that it is the alleged employee who makes that decision.

2. Ownership of instrumentalities, tools, equipment, appliances, or the supply of materials. These factors indicate something in the nature of a capital investment so that gains or losses will depend upon something other than the individual's own labour. On the other hand, reliance upon another's financial loss on capital infrastructure for the essential tools necessary for performance of the work is more likely to be associated with an employment relationship.
3. Evidence of entrepreneurial activity. This factor is closely associated with ownership of tools and encompasses self-promotion, advertising, use of business cards, soliciting to develop 'clients', the use of agents, and organizing one's 'business' (by incorporation or otherwise) to take advantage of limited liability or the tax laws. It may be significant whether the individual has a 'change of profit' or 'risk of loss'; that is whether business acumen sensitivity to the needs of the market, astute investment, innovation, or risk taking, yield a reward or financial loss.
4. The selling of one's services to the market generally. If the purchasers of individual's services are numerous and of diverse character, the individual looks more like an independent self employed person than an employee. If, on the other hand, an individual has a long standing and consistent relationship with one or a limited number of purchasers, he is more likely to be considered a 'dependent' contractor or employee -- especially if the circumstances or contractual relationship limit his ability to dispose of his skill to other purchasers, or his 'prime customer' is given priority.
5. Economic mobility or independence, including the freedom to reject job opportunities, or work when one wishes. Of course, few independent contractors are entirely free in this regard, but the question is one of the



degree. A 'self-employed' person has more scope for choice than an employee or dependent contractor who must look for the bulk of his work opportunities to one or restricted number of sources with whom he has 'tied his fortunes'.

6. Evidence of some variation in the fees charged for the services rendered. This factor is less helpful when those services are standardized and the market is relatively competitive. In such circumstances, one would expect a uniform fee structure even if the individuals providing the services were doing so as 'independent contractors', and individual employees may also bargain about their wage levels; however, the ability to bargain or fix the contract fee in accordance with the work or the purchaser's ability to pay, may indicate independent contractor or self employed status.
  
7. Whether the individual can be said to be carrying on an independent business' on his own behalf rather than on behalf of an employer or, to put it another way, whether the individual has become an essential element which has been integrated in to the operating organization of the employing unit. Integration in this sense usually presupposes a stable rather than a casual relationship and also involves the nature, importance and 'place' of the services provided in the general operation of the employing unit. The more frequent the re-engagement or longer the duration of the relationship, the more likely the individual will be regarded as part of, or integrated into, the employer's organization. In the case of entertainers, the cases suggest that it may also be useful to determine the extent to which the artist's material or co-workers are influenced by the employer; that is, whether the artist is left to entertain in his own right, or whether his talents are moulded to conform with the employer's artistic vision or interests. Even an individual engaged for a short time may be considered 'integrated' into the employer's operation in the manner of an employee, if he is required to devote the



whole of his working time during the period to the service of the employer, promote its organization, or fill in his 'non performing' time with unrelated ancillary duties. (See: Whittaker, supra.)

8. The degree of specialization, skill, expertise or creativity involved. If these are dominant element in the relationship, the control test becomes less useful as an indicator of employee status, and in the absence of 'integration' into the respondent's organization, the disputed individual is 'self-employed' professional.
9. Control of the manner and means of performing the work -- especially if there is active interference with the activity. However, it is the right to interfere rather than the ability to do so which is significant. The fact that a particular occupation involves technical skill, putting control of the details beyond the capacity of the employer, does not preclude a skilled employee from being so regarded, since the right to control may exist even though the ability to do so does not. Similarly, the power to discipline, withhold rewards, or terminate the relationship at will and without cause may indicate an employment relationship whether or not the employer exercises this power.
10. The magnitude of the contract amount, terms, and manner of payment. If the financial terms of the relationship approximate wages (for example, if deductions are made for income tax or other benefits are provided or if an individual is paid by the hour rather than the result) an employment relationship may be indicated. The magnitude of the contract amount can sometimes be significant, (although sports celebrities and professionals may be very highly paid yet still be 'employees'; and independent professionals may charge an hourly rate rather than a block fee).
11. Whether the individual renders services or works under conditions which are similar to persons who are clearly employees. The employer's established employee complement





may provide a useful benchmark against which the activities of its alleged independent contractors can be measured. if (sic) the so-called independent contractor substitutes for a firm's employees, or performs duties out of his ordinary line of work and similar to those of employees (for example, a trapeze artist also acting as a usherette, or a dancer also acting as a waitress) it is more likely that (s)he will be considered an employee."

While the factors enunciated by the Labour Relations Board in Algonquin Tavern may have special application to the entertainment industry, they also encompass many of the considerations appropriate to the fourfold and organization tests to which reference has been made. In our view, the combination of these tests together with the factors set out by the Labour Relations Board in Algonquin Tavern provide an appropriate framework within which to determine the status of Messrs. Brown, Meredith and Spitzer.

In this case, the contract between the Housing Authority and the Maintenance Handymen provides for the payment of a gross sum with no deductions or benefits. The Handymen are also responsible for the provision of workers' compensation, public liability insurance and are required to provide their own tools and vehicle. These features suggest that Messrs. Brown, Meredith and Spitzer are independent contractors rather than



employees. The terms of the contract, however, are not determinative and the substance of the relationship must be examined more closely.

While there was no evidence with respect to the percentage of time spent by Mr. Brown in working for the Housing Authority, Mr. Meredith devotes his time exclusively to this endeavour and certainly the vast majority of Mr. Spitzer's time is spent in the performance of work for the Housing Authority. Even in the case of Mr. Spitzer, it would not appear that he engages in a great deal of entrepreneurial activity or that he is actively involved in selling his services to the market generally. While Mr. Spitzer has hired students in the summer on a part-time basis, it is also not clear that these individuals have worked for the Housing Authority rather than for private residential customers for whom Mr. Spitzer also performs maintenance work.

The Handymen are regularly employed eight hours or more per day, five days per week. Although in theory, they may have freedom to chose when they work, it is clear from the evidence of Mr. Thompson that their regular availability is a necessary feature of their continuing to be retained by the Housing Authority. It is apparent, then, that there is little in the way of economic independence on the part of the Handymen and given that the work is performed on an hourly rated basis rather than by bid on a fixed or set price basis, the chance of profit and risk of loss is minimized. In fact, the risk of loss is



confined to the possibility that the Handymen may have to redo their work at their own expense in the event that it was not initially performed in a manner acceptable to the Housing Authority.

In this case, there was no evidence with regard to the conditions under which employees of the Housing Authority work from which a comparison could be made with the relationship between the Housing Authority and the Maintenance Handymen. There are, however, a number of features of that relationship which reflect elements of control found in the relationship of an employer and an employee. Each of the Handymen is in daily contact with the office to obtain work assignments and, in fact, Mr. Meredith testified that he speaks with "his" supervisor, namely the Maintenance Supervisor to whom he is assigned on a daily basis. The Maintenance Supervisors are responsible for prioritizing the work to be performed and, if appropriate, will direct a Handyman to perform a certain repair immediately. While Handymen establish their own work methods and are not overseen in the performance of maintenance tasks, this is consistent with the type of work which they perform. One would not anticipate that employees performing minor maintenance functions would be supervised directly. It is significant, however, that if a Handyman encounters difficulty, he obtains direction or instructions from the Maintenance Supervisor and that the work of the Handymen is checked by the Supervisors on a regular basis.





Although there are certain aspects of the relationship between the Housing Authority and Messrs. Brown, Meredith and Spitzer to suggest that these Handymen are independent contractors, an assessment of the evidence as a whole leads us to conclude that these factors are outweighed by a number of other features indicative of an employment relationship. All three Handymen have worked for the Housing Authority consistently for a number of years and are an integral part of the Housing Authority's operation rather than merely an accessory to it. The control exercised by the Housing Authority is also somewhat more than would normally be contemplated in a relationship with an independent contractor. Given the manner in which the Handymen are compensated and the regularity with which work is available to them, there is little in the way of chance of profit or risk of loss. Although the Handymen provide basic tools, major equipment and materials are provided by the Housing Authority.

The parties agreed that our determination would apply to all three Maintenance Handymen. In these circumstances and on the basis of the evidence as a whole, we declare that Messrs. Brown, Meredith and Spitzer are employees within the meaning of the Crown Employees Collective Bargaining Act. We shall remain seised for purposes of implementation of our decision in the event that this is required.

DATED AT TORONTO, this 20th day of March , 1987.

SCOTT H. DILLON  
For the Tribunal







The Crown Employees Collective Bargaining Act, RSO 1980, c.108

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

T/0022/85

BETWEEN: CANADIAN UNION OF HOUSING EMPLOYEES,  
LOCAL 1983

("the Applicant")

AND: THE CROWN IN RIGHT OF ONTARIO,  
(METROPOLITAN TORONTO HOUSING AUTHORITY)

("the Respondent")

AND: CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 767

("the Intervener")

BEFORE: PAMELA C. PICHER, Vice-Chairman  
E. C. WITTHAMES, Member  
W. G. WRIGHT, Member

APPEARANCES:

FOR THE APPLICANT: Maurice Green, Counsel

FOR THE RESPONDENT: A. Tarasuk, Counsel

FOR THE INTERVENER  
EMPLOYEE ORGANIZATION: Michael Mitchell, Counsel

HEARING: January 20, 1986

D E C I S I O N

1. This is an application for certification through which the applicant organization seeks to displace the intervener as the exclusive bargaining agent





for the maintenance employees of the Respondent.

2. A pre-hearing vote was taken on November 18 through November 22 of 1985. The ballot box was sealed pending further submissions from the parties. The central outstanding issue concerns the status of the applicant organization.

3. The Tribunal heard evidence and submissions concerning the formation of the applicant. Counsel for the Intervener argued that the applicant was not an employee organization within the meaning of section 1(1)(g) of the Act because of problems which could result from the provisions of the constitution which relate to the election of officers. The constitution provides that only those members who have attended at least 12 of the regularly scheduled general membership meetings preceding the date of nominations are eligible to run for office. The evidence reveals, however, that 12 such meetings have not in fact taken place, and in all likelihood will not have taken place before the next scheduled elections. Counsel maintains, thereby, that these provisions could preclude most any member from running for election and result in the present executive perpetuating itself in office forever. Counsel observes that he could further argue that under a strict interpretation of these provisions of the constitution even the present officers have no legitimacy.

4. In *Re C.S.A.O. National (Inc.) and Oakville Trafalgar Memorial Hospital Association* (1972), 26 D.L.R. (3d) 63, the Ontario Court of Appeal



quashed the decision of the Ontario Labour Relations Board which had denied the applicant for certification status as a trade union on the ground that its by-laws discriminated against provisional members by barring them from holding office. The Court of Appeal determined that by denying status on the basis of inter-membership discrimination, the Board had exceeded its jurisdiction by creating an unjustified impediment to certification. The Court considered that it had created a qualification not included in the statutory definition of a trade union.

5. In the instant matter, the Tribunal has reviewed the circumstances surrounding the formation of the applicant organization as well as the terms of its constitution. We are satisfied that the applicant is an organization of employees formed for the purpose of regulating relations between the employer and employees under the Act and, further, that it does not fall within the excluding circumstances set out in sub-sections (i) through (v) of section 1(1)(g) of the Act.

6. Having regard to the decision of The Court of Appeal in *Re C.S.A.O.*, supra, the Tribunal concludes it would be inappropriate to deny the applicant status on the basis of the provisions of the applicant's constitution concerning the eligibility of members to run for office. In our assessment, to deny the applicant organization status on that ground would be to add a condition of status not contemplated by the Act. Moreover, and in any event, the constitution contains provisions for its own amendment by a two-thirds majority. As well, the executive has already advised the members that they



will be able to run for office in the next election. (See also Ontario Hospital Association (Blue Cross), [1981] OLRB Rep. June 763; Chrysler Canada Ltd., [1975] OLRB Rep. July 852; and Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers and the Bank of Nova Scotia, (unreported decision of the Canada Labour Relations Board, September 30, 1985, (file No. 555-2319)).

7. For the reasons set out above, the Tribunal finds that the applicant is an employee organization within the meaning of section 1(1)(g) of the Act.

8. Having regard to the agreement of the parties, the Tribunal further finds, pursuant to section 5(4) of the Act, that the following is the unit of employees appropriate for collective bargaining:

All employees of the Metropolitan Toronto Housing Authority save and except for those employees covered by subsisting collective agreements and those persons who are not employees within the meaning of Clause (f) of subsection 1 of section 1 of the **Crown Employees Collective Bargaining Act**.

For the purpose of clarity, the above described unit includes persons within the Municipality of Metropolitan Toronto, namely, Labourers, (Groundsmen), Senior Labourers, (Senior Groundsmen), Caretakers, Senior Caretakers, Serviceman General, Heating and Appliance, Senior Serviceman General and Heating, Truck/Tractor Drivers, On Site Caretakers, 4th and 3rd Class Maintenance and Shift Operating Engineers and all other classifications of Maintenance Employees who are and/or would be employed in the work within the existing bargaining unit herein described.

9. The Tribunal further finds, for the purposes of section 5(4) of the Act, that not less than 35 per cent of the employees in the bargaining unit were



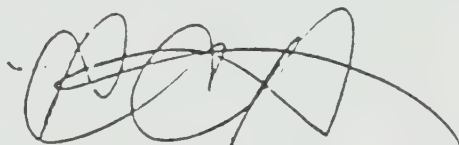


members of the employee organization at the time the application was made.

10. Pursuant to its authority under the Act, the Tribunal directs that the ballot box be opened and the vote counted.

11. The matter is referred to the Registrar for that purpose.

Dated at Toronto, Ontario, this 11th day of February, 1986.

A handwritten signature in dark ink, consisting of several loops and a long horizontal stroke extending to the right.

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Pamela C. Picher, Vice-Chairman  
Labour Relations Tribunal







The Crown Employees Collective Bargaining Act  
ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

T/0022/85

**BETWEEN:**

CANADIAN UNION OF HOUSING EMPLOYEES, LOCAL 1983  
("the Applicant")

**AND:**

METROPOLITAN TORONTO HOUSING AUTHORITY  
("the Respondent")

**AND:**

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 767  
("the Intervener")

**BEFORE:**

P. Picher, Chairman  
W. Wright, Employer Member  
E. Witthames, Employee Member

**FOR THE APPLICANT:**

D. Roach, President

**FOR THE RESPONDENT:**

A. Tarasuk, Consultant

**FOR THE INTERVENER:**

G. Charney, Counsel

**HEARING DATES:**

April 21, 1986  
July 24, 1986







## DECISION

1. This is an application for certification filed under the **Crown Employees Collective Bargaining Act**, R.S.O. 1980, c. 108, as amended, by the Canadian Union of Housing Employees, Local 1983. Through this application the Applicant seeks to displace the Intervener, the Canadian Union of Public Employees, Local 767, as the exclusive bargaining agent for the maintenance employees of the Respondent.

2. A pre-hearing vote was taken on November 18, 19, 20, 21 and 22 of 1985. The ballot box was sealed pending further submissions from the parties. At that point the central outstanding issue concerned the status of the Applicant organization.

3. Through a hearing held on January 20, 1986 and by a Decision issued on February 11, 1986, the Tribunal determined that the applicant organization was an employee organization within the meaning of section 1(1)(g) of the **Act**.

4. The Tribunal further determined in its February 11th Decision that, having regard to the agreement of the parties, the unit of employees appropriate for collective bargaining was as follows:

All employees of the Metropolitan Toronto Housing Authority save and except for those employees covered by subsisting collective agreements and those persons who are not employees within the meaning of Clause (f) of subsection 1 of section 1 of the **Crown Employees Collective Bargaining**



**Act.**

For the purpose of clarity, the above described unit includes persons within the Municipality of Metropolitan Toronto, namely, Labourers (Groundsmen), Senior Labourers (Senior Groundsmen), Caretakers, Senior Caretakers, Serviceman General, Heating and Appliance, Senior Serviceman General and Heating, Truck/Tractor Drivers, On Site Caretakers, 4th and 3rd Class Maintenance and Shift Operating Engineers and all other classifications of Maintenance Employees who are and/or would be employed in the work within the existing bargaining unit herein described.

5. Having further determined, pursuant to section 5(4) of the **Act**, that not less than 35 percent of the employees in the bargaining unit were members of the applicant organization at the time the application was made, the Tribunal directed in its February 11th Decision that the ballot box be opened and the representation vote between the Applicant and Intervener organizations be counted.

6. To this end, the Tribunal's Returning Officer, who had been placed by the Tribunal in charge of the vote and vote count, convened a meeting of the parties on or about February 18, 1986, during which the ballots were counted. His Report of the results of the vote, dated February 28, 1986, established that fewer than 50 percent of the ballots cast were cast in favour of the Applicant. In these circumstances, having regard to section 4(2) of the **Act**, and apart from objections filed concerning the Report, the Tribunal would dismiss the application for certification on the basis of insufficient employee support for the Applicant.

7. Following the release of the Returning Officer's Report of the results



of the vote, statements of objection to the Report were received from the Applicant organization within the time set for such filings, which was up until March 18, 1986.

The following letter of complaint dated March 17, 1986 was sent to the Tribunal by the president of the Applicant, Mr. D. Roach:

March 17, 1986  
File #T/0022/85

Delivered by Hand

Ms. T.A. Inniss  
Registrar  
Ontario Public Service  
Labour Relations Tribunal  
180 Dundas St. W. #2100  
Toronto, Ontario  
M5G 1Z8

Dear Ms. Inniss:

Pursuant to form 15 and/or 16 of the Crown Employees Collective Bargaining Act, 1972, the applicant union, the Canadian Union of Housing Employees, local 1983, hereby serves notice of our desire for a hearing before the 'Tribunal' whereat the applicant union desires to make representations in the matter of and between the Canadian Union of Housing Employees, local 1983 (Applicant) and the Crown in Right of Ontario (M.T.H.A.), (Respondent) and the Canadian Union of Public Employees, local 767 (Intervener).

It is also desired that the hearing requested be convened at the 'Tribunal's' earliest convenience, bearing in mind that the collective agreement for the M.T.H.A employees expired December 1985.

The applicant's statement, summarizing the representations we wish to have the "tribunal" consider, in connection with the "Returning Officers Report of Vote" form 15, and attached thereto 'certification of Conduct of Election, and form 16, attached thereto, 'The Returning Officers Report of Vote on counting of Ballots, is as follows:





[Note that the specific objections have not been reproduced at this point because they are set out in even more detail below in the Applicant's letter to the Tribunal dated April 17, 1986.]

. . .

Respectfully submitted and awaiting your  
earliest reply

Yours truly, on behalf of the Applicant

"D.V. Roach"  
President  
Canadian Union of Housing Employees,  
Local 1983  
3092 Don Mills Road #4  
Willowdale, Ontario M2J 3C3

The date of April 21, 1986 was set by the Tribunal to entertain evidence and submissions regarding the Applicant's statement of objection. Prior to that hearing and pursuant to the request of counsel for the Intervener, counsel for the Applicant submitted further particulars of its objection to the Returning Officer's Report concerning the results of the vote. That letter, dated April 17, 1986, reads as follows:

April 17th, 1986

Ms. T.A. Inniss  
Registrar  
Ontario Public Service  
Labour Relations Tribunal

. . .

Dear Ms. Inniss:

As requested by counsel for the Intervener and in line with Rule 31 of the Board's rules, the following particulars of the allegations set out in the Applicant's letter of March 17,



1986 are herewith supplied.

1. "The applicant union was denied access to the process used to ascertain the position the applicant union would have on the ballot in effect, being permitted to ascertain the results of the flipping of a coin by the 'Returning Officer'."

The applicant union members involved were Art Lombard, Bill Williams, Ed Morgan and Don Roach.  
The date was October 29th, 1985.  
The place was 180 Dundas Street West.

2. "The applicant union was denied access and, to the information regarding the number of ballots printed and received for the vote."

The applicant's scrutineer made request of Returning Officer.  
The date was November 18th, 1985 at 8:30 a.m.  
The place was 1 Firvalley Court.

3. "'Returning Officer' left voting table at Alexander Park with handful of blank ballots (approx. 100) entered a side room with a Chief Steward of the intervener, wherein they were alone for approx. 3 minutes, out of sight and sound of the applicant's scrutineer."

The Chief Steward was Sam Nasso.  
The date was November 21st, 1985, at 2:10 to 2:25 p.m.  
The place was 65 Augusta Avenue in the "lunchroom".

4. "Respondent scrutineer interfered with the voting process by encouraging verbally an intervener supporter to vote just prior to the poll closing."

As polling was about to close Paula Lytwyn, scrutineer for the respondent stated to Walter Defoe, scrutineer for CUPE "Hey, you didn't vote, get up and vote".  
The date was November 22nd, 1985 at the closing of the poll;  
The place was 180 Dundas Street West, Suite 2100.

5. "Returning Officer using back of blank ballot to total number of ballots issued and number of voters."

The use of ballot as a scratch pad; indicative of loose procedure.  
The date was November 22nd, 1985 from 9:30 to 10:00 a.m.



The place was 180 Dundas Street West, Suite 2100.

6. "Returning Officer destroyed blank ballot by cutting into pieces."

The destruction of the ballot; impairing integrity of the Count.

The date was November 22nd, 1985 at 10:30 a.m.

The place was 180 Dundas Street West, Suite 2100.

7. "Premature and deviation from practice, regarding the signing or an undated certification of 'conduct of election' document."

Withdrawn

8. "Returning Officer refused official request by the applicant union, to see and count unused ballots remaining only stating "700 ballots were received by Tribunal, 581 used, therefore 119 are left"."

The request was made by applicant's scrutineer;

The date was February 18th, 1986.

The place was 180 Dundas Street West, Suite 2100.

9. "Ballot box sealing tape signed by all scrutineers was torn approx. 6" to approx. 1/8th of an inch from 'Tribunal Seal' and separate piece of wax on box next to torn tape."

The damaged condition of the tape was brought to the Returning Officer's attention by the Applicant's scrutineer in the presence of members of the union, Art Lombard and Ed Morgan.

The date was February 18th, 1986.

The place was 180 Dundas Street West, Suite 2100.

10. "Returning Officer deviates from previous practice after counting of ballots, by not offering as requested, a document for signing, as to the fair and democratic conduct of same."

The applicant's scrutineer requested a document to sign wherein he could indicate his concerns as to the irregularities that took place.

The date was February 18th, 1986.

The place was 180 Dundas Street West, Suite 2100.

11. "Notice by Returning Officer of ballot box tape torn, and separate piece of wax, yet did not inquire and/or





take any action."

The applicant scrutineer and Ed Morgan showed the Returning Officer the areas of their concern as to the "torn tape" and they were advised that if they wanted inquiries to be made as to this or to complain about it, it would mean a three month delay.

The date was February 18th, 1986.

The place was 180 Dundas Street West, Suite 2100.

12. "During counting of ballots, three separate tables were used, out of 'line of sight' from each other and with numerous individuals from the intervener at one table, two at the respondent table with only one at the applicant table."

- and -

13. "At any given time, two to three different bundles of ballots were on the intervener's table, as well as the respondent's table. A number of persons at the intervener's table were counting and handling the ballots."

The counting process was allowed to get completely out of control.

The ballots were counted and handled by the following members of CUPE, who were not scrutineers; J. Lynn and J. Bird. The members of the respondent were Messrs. Rae and Snedden.

During the count Sam Nasso who is the Chief Steward of CUPE approached the table on which ballots were being counted and interfered with the counting.

The movement of the ballots from table to table was done by CUPE and Respondent scrutineers only and was done in such a manner that the applicant scrutineer was unable to ascertain whether the total ballots counted were in fact the total of all the ballots marked and/or whether the ballots being counted were in fact the only ones that the members had signed or whether they were ones placed into the count by others, either during the count or prior to the date when the count took place. The date was February 18th, 1986.

The place was 180 Dundas Street West, Suite 2100.

14. "Returning Officer in an attempt to pacify complaints from members of the applicant union, re not being able to count unused ballots, carried into a private room, all bundles of ballots used in the counting of the vote, and allowed them to handle, count and peruse all ballots cast



in the vote, prior to handing down his form 16 'Returning Officer's Report of Vote on Counting of Ballots'.

"The Respondent's scrutineer was not present nor was the Intervener's scrutineer."

The members present were Messrs. Morgan, Williams, Abbott, Roach and Lombard.

The scrutineers for the Respondent or the Intervener were not present when the applicant members examined the ballots.

The scrutineer for the Respondent and the Intervener were not advised to remain at the Board or called back to the Board to allow the count to be completed by counting the unused ballots.

The date was February 18th, 1986.

The place was 180 Dundas Street West.

15. "Contrary to Returning Officer's statement that 119 ballots (unused) remained, Ms. T.A. Inniss personally counted the unused ballots and counted 100 over what the Returning Officer stated were remaining and unused."

- and -

16. "Registrar of 'Tribunal' stated she could only "assume" the extra 100 ballots later discovered were received from the printer."

Telephone conversations with the Applicant's scrutineer took place on February 27th, 1986.

17. "Name of 'printer' - re ballots was requested of 'Returning Officer' which he supplied. When printer representative directly involved in the order was asked how many ballots were ordered, printed and shipped, he replied "700"."

The printer was Jules Beauregard, who made the statement in a telephone conversation with the Applicant's scrutineer.

The date was February 19th, 1986.

18. "The receiving report signed by the "Tribunal" office manager was for 700 ballots."

The report (invoice #2176) was signed by Theresa Camashe, office manager of the Tribunal.

The date is on the invoice, copies of which have been



requested to be supplied to the Tribunal by the Applicant by telegram dated March 19th, 1986.

Copies of this letter have been delivered today to the counsel for the Respondent and the Intervener. Should there be any further particulars requested, I would be available at my office for the remainder of the day and tomorrow to supply such.

Yours very truly,  
"Cyril J. Abbass"

Some of the objections raised by the Applicant relate to the actual vote that was taken on November 18, 19, 20, 21 and 22 of 1985 while others concern the counting of the vote in February of 1986. Counsel for the Intervener objected to the Tribunal hearing any objections relating to the vote itself on the following two grounds: First, he asserted that it was inappropriate because following the taking of the representation vote in November of 1985 the scrutineers for the parties, including Mr. Roach for the Applicant, signed a statement certifying the fairness of the balloting itself. That statement stipulated that,

We, the undersigned, acted as scrutineers for the parties herein in the conduct of the balloting at the time and place above mentioned. We certify that the balloting was fairly conducted and that all eligible voters were given an opportunity to cast their ballots in secret, and that the ballot box was protected in the interest of a fair and secret vote.

Second, counsel emphasized that when the formal Report of the Returning Officer regarding the vote was sent to the parties, the Tribunal, by notice dated December 2, 1985, advised that if anyone wished to make





representations as to any matter relating to the representation vote it was required that such representations be sent to the Tribunal by December 18, 1986. The Applicant sent the Tribunal no statement of desire to make representations concerning the taking of the vote within the time set by the Tribunal for the registering of such objections, or indeed at any time prior to the point when the vote was counted and the Applicant learned that it had lost. The December 2, 1985 notice further advised that,

5. If no statement of desire to make representations is sent to the Tribunal in accordance with paragraphs 3 and 4, the Tribunal may dispose of the application upon the material before it on all matters except as to the result of the vote without further notice to the parties or the employees.

In support of his objection to the Applicant raising objections to the vote itself at this stage of the proceeding, counsel for the Intervener relies on the following quotation from **Belmont Plastering**, [1975] O.L.R.B. Rep. 720 at p. 721:

4. In our view the conduct which intervener #1 seeks to complain of is a matter which relates to the representation vote itself rather than to the accuracy of the report on the vote or to the conclusions the Board should reach in view of the report. Hence the allegations of intervener #1 ought to have been filed with the Board within the time fixed in Form 45, namely, May 8, 1975. As the Board stated in the **Fleck Manufacturing Limited** case, 62 CLLC para. 16,236, it is incumbent on all parties to proceedings before the Board to investigate matters relevant to their cases as early as possible and if they intend to make allegations of improper or irregular conduct against another party to do so promptly. Intervener #1 apparently made no effort to investigate the matters of which it complains until



some four weeks after the alleged conduct occurred. Intervener #1 stated at the hearing that it did not file its allegations until after the ballots were counted and it was known that the applicant had won the representation vote. In our opinion, allegations of improper or irregular conduct ought to be filed forthwith after a party has promptly investigated the events which give rise to such allegations. It is no answer, in the circumstances of this application, to wait for the outcome of the representation vote.

(See also **Chateau Gardens (London) Inc.**, [1977] O.L.R.B. Rep. Jan. 12; **Regina v. Ontario Labour Relations Board, ex parte Pure Spring (Canada) Ltd.** (1965), 49 D.L.R. (2d) 313 (Ont. High Court).)

In short, the Intervener objected to the Applicant raising allegations about the actual taking of the representation vote (as opposed to the Report on the results of that vote or the counting of the vote) after it learned that it had lost the vote, when it should have lodged such objections in the time designated by the Tribunal for the registering of such complaints and, moreover, when the Applicant's scrutineer signed a statement specifically attesting to the fairness of the vote.

Through the instant proceeding and on the basis of the complaint set out above, the Applicant requests that the vote of November 18, 19, 20, 21 and 22, 1985 be set aside and that a new vote be taken. While some of the objections relate directly to the counting of the ballots, the Applicant does not request a recount.

In **Rosco Metal Products Limited**, [1963] O.L.R.B. Rep. 493 the



Ontario Labour Relations Board made the following statement of principle at p. 494:

The principle that has been applied by the courts in cases involving disputed elections is that when an election is conducted in a manner which is substantially fair, any mistake or irregularity which does not affect the result will not invalidate the election. (**Re Murray and Portage La Prairie**, 14 W.W.R. (N.S.) 553, 63 Man. R. 84, (1955) 5 D.L.R. 292; **Re Monk; Grant v. McCallum** (1876) Hodg. 725, 12 C.L.J. 113; **Regina ex rel. Preston v. Touchburn** 6 P.R. 344). We are of the opinion that the same principle should govern vote proceedings conducted by the Board.

At the outset of the instant hearing, the Tribunal invited clarification of the precise nature of the Applicant's complaint and the manner in which the Applicant considered that some of the matters complained about adversely affected either the authenticity of the vote itself or the reliability of the count. Through that inquiry the Tribunal received direction from counsel for the Applicant, Mr. C. Abbass, concerning the nature of some of the evidence that would be called and the purpose for which it would be used.

We turn then to consider the specific items (1 through 18) of the Applicant's complaint as set out in its letter dated April 17, 1986, quoted above. The basic sequence of our evaluation runs in reverse of the order in which the items appear on the complaint. To facilitate our deliberation, however, we have grouped the various items of the complaint which bear on the same subject matter.





One of the main concerns lodged by Mr. Roach (see items 2, 8, 15, 16, 17 and 18 of the complaint) is that after the ballots had been counted and after Mr. Roach learned that his union had lost the vote, he was denied permission by the Tribunal's Returning Officer to inspect the unused ballots (those that had been printed but had not been used in the vote). It has never been the practice of the Tribunal to either count the unused ballots itself or to give them to the parties to count. In these circumstances the Returning Officer advised Mr. Roach to put his request to inspect the unused ballots directly to the Tribunal. At the time, however, the Returning Officer offered an estimate of the probable number of unused ballots. Based on information relating to the number of blank ballots that had been ordered by the Tribunal, and the number that had been used in the vote, the Returning Officer estimated that there would be approximately 119 unused ballots remaining, and he so informed Mr. Roach.

Through a telegram to the Tribunal's Registrar dated February 21, 1986 Mr. Roach requested access to the unused ballots. That telegram provides as follows:

CNCP Telegraph

February 21, 1986

Telegram for Theresa Inniss

A request was made of Mr. Murray Neave, the Returning Officer, at the February 18, 1986 Vote Counting Meeting, for the unused ballots to be counted ensuring the balance between ballots printed, ballots issued and ballots remaining. Mr. Neave refused to comply with our request stating that it was not the practice of the process to do so. Although Mr. Neave informed us that 700 ballots were printed, and by our



count of the vote, 589 ballots were issued for voting purposes, the missing third part of the voting process equation, namely the count of the unused ballots was denied, thereby frustrating our attempts to ensure a free, open, acceptable and democratic voting process. Bearing in mind all other factors in the process were made known to us, upon our repeated requests for access to the unused ballot balance, Mr. Neave suggested we reduce to writing our demand. By this communication, we hereby request full disclosure of facts surrounding the voting process, in particular, access to the unused ballots remaining. It is beyond our acceptance and understanding why only two parts of a three part voting equation is allowed to be divulged and not the third part in effect, total facts divulged allowing for the fair, open and democratic scrutiny to the satisfaction of all parties. In anticipation of your earliest reply on behalf of the Executive Board and general membership of the Canadian Union of Housing Employees, Local 1983.

Signed D.V. Roach

Subsequently, on March 18, 1986 Mr. Roach sent another telegram to the Tribunal requesting further documentation relating to the unused ballots:

. . .

Ms. T.A. Inniss, Registrar

. . .

Pursuant to our telephone conversation of Tuesday March 18th 1986 re my request for access to pertinent documentation re file number T/0022/85 and my telegram to yourself dated March 2/86, I hereby again, request for purposes of preparation for presentation to the Tribunal,

1. P.O. requisition and number for total ballots ordered in the matter of the representation vote.
2. Receiving report signed by the Tribunal's office manager.
3. Robinson Printing Company shipping invoice.



4. Access to, for perusal and counting purposes, the unused ballots remaining.
5. Other relevant documentation dealing with directly and indirectly the matter of the representation vote process.

Yours truly  
D V Roach, President

Prior to the hearing and after the Tribunal itself counted the number of unused ballots, it informed the then counsel for the Applicant, Mr. M. Green, that there were in fact 219 unused ballots rather than the 119 originally estimated by the Returning Officer. As would become apparent, substantially more ballots were printed and sent to the Tribunal than were in fact ordered.

In response to Mr. Roach's various requests, the Tribunal, at the outset of the instant hearing, gave the parties copies of the purchase order which indicated an order of 700 ballots and the invoice from the Robinson Printing Company which reflected a charge for 700 ballots. The Tribunal did not have the document itemized in point no. 2 of Mr. Roach's telegram relating to a report of receipt of the ballots signed by the Tribunal. At the hearing the Tribunal provided Mr. Roach and the other parties with the opportunity to fully inspect all of the unused ballots. Nothing untoward was revealed by this inspection and no claim of such was made by the Applicant following the inspection.

It would appear from the evidence that while the Tribunal ordered 700 ballots it in fact received approximately 800. Mr. Jules Beauregard, a





partner in Robinson Communications, the company that printed the ballots, was called by the Applicant to testify. He stated that he viewed the 700 order as a minimum requirement. He testified that his company does not guarantee that it will send a customer the exact number of copies ordered unless the order specifies delivery of a precise number. If it does, a physical count is done and an extra charge is levied. What Robinson Communications does guarantee is that it will send at least the number of documents ordered. Mr. Beauregard testified that he knows he sent the Tribunal at least 700 ballots because that is what was ordered. He was unable to estimate, however, the number of ballots over and above the 700 that would have been sent to the Tribunal. He commented that that would be anyone's guess. After carefully considering all of the facts, including the number of ballots issued to employees for voting purposes (approximately 581) as well as the number of unused ballots counted by the Tribunal (219), we are satisfied that the Tribunal was sent approximately 800 blank ballots notwithstanding that it ordered and paid for only 700.

It is undisputed that the Returning Officer initialled every ballot that was placed in the ballot box. It is further undisputed that all of the ballots counted in the final tally had the Returning Officer's initials on them. When asked at the hearing about the relevance to the Applicant's case of the number of unused ballots, counsel for the Applicant indicated that it was relevant to a possible stuffing of the ballot box and to the possibility of extra ballots being placed on the table during the counting. In light of the fact that all of the 581 ballots cast and counted bore the initials of the Returning



Officer, counsel for the Applicant conceded that the only way the ballot box could have been stuffed or that extra ballots could have been placed on the table for counting would have been either through someone forging the Returning Officer's initials or through the Returning Officer stuffing the box himself.

It was apparent from the representations of counsel for the Applicant, as well as the evidence given by Mr. Roach, that the Applicant could produce not one shred of evidence that the ballot box had been stuffed, that extra ballots had been placed on the table, or that the Returning Officer's initials had been forged. The Tribunal has itself inspected the ballots and is satisfied that no initials on the ballots have been forged. The Returning Officer involved in this matter has been conducting labour relations votes under provincial legislation for over 25 years. He holds the respect of the labour relations community and has the full confidence of the Tribunal. The evidence does not even begin to suggest that he engaged in any impropriety regarding the ballots and we so find, that he did not.

Having regard to the circumstances set out above, the Tribunal is fully satisfied that neither the initial uncertainty about the actual number of unused ballots nor the Returning Officer's direction to the Applicant to make its request to see the unused ballots directly to the Tribunal casts any doubt on the authenticity of the vote that was taken or the count of that vote. Moreover, at the hearing the Tribunal provided the parties with an opportunity to peruse the unused ballots and nothing of concern was raised by the



Applicant after its inspection. Accordingly, the Tribunal is satisfied that items 2, 8, 15, 16, 17 and 18 of the Applicant's complaint do not provide cause for setting aside the representation vote, as taken.

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We turn then to item no. 14 of the particulars of the complaint. The Applicant complains that before the formal Report of Vote Count had been issued, the Returning Officer, out of the presence of the Intervener or Respondent scrutineers, allowed the Applicant to inspect the ballots that had been counted. It is clear from Mr. Roach's evidence that what led to this step was a question to the Returning Officer from the Applicant representatives, directed after the vote had been fully counted. The Applicants were trying to understand the loss they had not expected and one of their representatives asked the Returning Officer whether, through inadvertence, it would have been possible for one of the bundles of ballots to have been mislabeled and counted as an Intervener bundle when it in fact had been an Applicant bundle. In response the Returning Officer allowed the Applicant representatives to inspect the ballots that had already been counted in the presence of all the parties and their scrutineers.

It may be noted that neither the Intervener nor the Respondent has complained about the Returning Officer showing the Applicant the ballots out of their presence after the formal count had already been completed. At the outset of the hearing, however, counsel for the Applicant advised the Tribunal that the relevance of this item of complaint was to show an alleged looseness of procedure and attitude followed by the Returning Officer. The implication





the Applicant would ask the Tribunal to draw is that if the Returning Officer would show the ballots to the Applicant out of the presence of the Intervener and the Respondent scrutineers, he might, on another occasion, have done something similar with the Intervener and/or Respondent out of the presence of the Applicant, at which point, presumably, something improper could have happened to the ballots. Nothing specific in this regard, however, was actually alleged by the Applicant. Counsel for the Applicant indicated that the Applicant did not have any evidence that an untoward incident with the Intervener and/or the Respondent ever took place.

Even assuming the facts as alleged in item no. 14 of the complaint to be true, the Tribunal is satisfied that they do not provide cause for the Tribunal to set aside the vote. At the time the Returning Officer showed the ballots to the Applicants for their inspection, the ballots had already been counted and the parties advised of the results. The Applicants were surprised to learn they had lost the vote and were looking for a possible explanation by wondering if one of the bundles of ballots had been mislabeled. In response to that concern and to allay any doubts about the veracity of the count, the Returning Officer allowed the Applicant's representatives, at their request, to inspect the ballots. This step casts absolutely no doubt on the veracity of the vote or the count.

We look then to items 12 and 13 which address the actual counting of the ballots. It is undisputed that the Returning Officer was the first person to count all the ballots as they came out of the ballot box; he then put them in



bundles of 50 marked for either the Applicant or the Intervener, as the case was. It is the position of the Applicant, as expressed by counsel for the Applicant, that Mr. Roach should have been the next person to count all bundles of ballots, after which the scrutineers for the other parties would have done so. That, however, is not the procedure that was adopted. It would appear instead that after the Returning Officer counted the ballots, representatives of each party counted and initialled respective bundles of ballots, at the same time, and then handed the bundles over to the other party for its counting and initialling. In the end each party counted and initialled every bundle. It was the stated position of the Applicant that the process of counting the votes was done too quickly, was insufficiently organized and was too confusing (as numerous people were moving back and forth) to be reliable. Evidence of the counting process was presented by Mr. Roach and has been carefully reviewed by the Tribunal.

Counsel for the Applicant specifically advised the Tribunal that it had no evidence that any actual wrongdoing in respect of the ballots took place during the counting of the ballots. He asserted, however, that the problem was one of the perception and the possibility that in the alleged confusion something improper could have happened.

Even accepting as accurate Mr. Roach's testimony of the manner in which the vote count was carried out, the Tribunal finds that it provides no basis for bringing into doubt the reliability of the vote or the accuracy of the count. All of the ballots that were cast were counted and were counted first



by the Returning Officer, who initialled each of the bundles before anyone else handled them. There was no evidence put forward by Mr. Roach or suggested by counsel for the Applicant that any actual wrongdoing occurred in connection with the ballots during the counting, and we conclude that it did not. Accordingly, the Tribunal finds that items 12 and 13 of the complaint do not support a conclusion that the vote should be set aside.

Continuing through the allegations, items 9 and 11 concern the discovery of torn tape on the seal of one of the two ballot boxes prior to its being opened by the Returning Officer for the count on February 18, 1986. Neither the formal complaint allegations, nor Mr. Roach's evidence, suggests that the actual wax seal was disturbed. Rather, it was asserted that the sealing tape under the wax was torn approximately six inches to approximately 1/8th inch from the Tribunal's wax seal, and that there was a separate piece of wax on the box next to the torn tape. (We note that in evidence Mr. Roach clarified that the tape was torn 2 to 3 inches and to a distance of approximately 1/2 inch from the seal.) Counsel for the Applicant conceded that in the circumstances the only way anything improper could have happened to the ballots between the point when they had been sealed into the box in the presence of the respective scrutineers, after the vote, and the point in issue when the box was presented for opening, again in the presence of the scrutineers, would have been if the Returning Officer had acted irresponsibly or if the Tribunal had failed to properly protect the ballot box. There is absolutely no evidence either given or alleged to support either of these suggested possibilities, and we conclude that the ballot boxes were not in fact





disturbed.

Moreover, the evidence given by Mr. Roach reveals that the matter of the torn tape was brought to the attention of all the scrutineers. It was discussed and everyone, including the Applicant, agreed to proceed with the opening of the box notwithstanding the condition of the tape. According to Mr. Roach's own testimony, the Returning Officer specifically asked if everyone was satisfied with the condition of the box before he lifted the tape and opened the box.

In the absence of any suggestion that the wax seal itself was disturbed, in the absence of any evidence whatsoever of actual interference with the box, and given the specific awareness of the torn tape on the part of the Applicant and its clear agreement to proceed with the opening of the box notwithstanding the tear, the Tribunal concludes that items 9 and 11 of the complaint cast no doubt on the reliability of the vote and provide no basis for setting aside its results.

Item 10 of the complaint particulars concerns the allegation that the Returning Officer did not provide the Applicant with a document to sign to attest to the fairness of the count. The complaint particulars indicate that the Applicant scrutineer (Mr. Roach) requested the document to sign "wherein he could indicate his concerns as to the irregularities that took place". In his testimony Mr. Roach recounted that he asked the Returning Officer if he had such a document for him to sign, that the Returning Officer replied that he



didn't and that Mr. Roach then advised the Returning Officer that they were going to a meeting room. The evidence does not suggest that the Returning Officer did anything to prevent the Applicant from registering whatever complaint it wanted concerning the count. In fact, the notice from the Tribunal formally advising of the vote results specifically provides for the registering of such complaints. Through that process the instant complaint came before the Tribunal and is being given full consideration.

In these circumstances the Tribunal is satisfied that item 10 of the complaint particulars and the supporting evidence of Mr. Roach provide no basis for setting aside the vote.

Item 7 of the complaint was withdrawn.

Items 5 and 6 involve a complaint that the Returning Officer destroyed a blank ballot by cutting it into pieces after having used it to total up the number of voters and number of ballots issued in the vote. In his evidence Mr. Roach stated that after the vote was completed on November 22, 1985 the Returning Officer used the back of a blank ballot to calculate the number of people who had voted and then cut it into pieces. Counsel for the Applicant acknowledged that this activity could have had no impact on the vote result; he asserts, however, that it reflects a general looseness of procedure and lack of concern for unused ballots.

Assuming the accuracy of the facts asserted in item 6 (albeit not the



conclusion alleged therein) as well as Mr. Roach's supporting testimony, and assuming, but without finding, that the Tribunal would entertain at this date an allegation relating to the events transpiring at the time of the vote, we find that these items of the complaint do not establish any basis for setting aside the vote as taken. They cast no doubt whatsoever on the reliability of the vote or its results.

Regarding item 4, counsel for the Applicant stated that it was not pressing any complaint against the Respondent.

Looking to item 3 of the complaint, the matter raised therein concerns the vote itself. Full opportunity was provided the Applicant to register any objections concerning the vote itself up until December 18, 1985. As noted above, no such complaint was filed. However, in the instant proceeding Mr. Roach testified, by way of complaint, that at one point during the voting the Returning Officer walked briefly into a side room with some ballots in his hand to talk to someone who had just come into the area. Mr. Roach was concerned and followed the Returning Officer. When he went into the side room he found them talking about a trip to Argentina. While Mr. Roach was upset by the occurrence his evidence does not suggest that any impropriety occurred. In fact, the full weight of the evidence is to the contrary. Accordingly, even assuming the accuracy of Mr. Roach's account, and assuming but without finding that the Tribunal would entertain at this point an allegation relating to the vote itself, the Tribunal finds that item 3 does not cast doubt on the reliability of the vote or its results.





We look finally to the first item of the complaint, which again relates more to the vote than to the count and concerns the flipping of the coin by the Returning Officer to determine the position the respective unions would have on the ballot. Mr. Roach testified that when the Returning Officer tossed the coin for this purpose at a meeting of the parties preceding the vote, he, Mr. Roach, called the toss. His complaint is that the Returning Officer pulled the fallen coin off the table and declared that the Intervener had won the toss before Mr. Roach had a chance to go up to the table to see the position of the coin for himself.

Even assuming that the facts as testified to by Mr. Roach are accurate, and even assuming that it would have been better for the Returning Officer to have waited for each party to specifically inspect the tossed coin, the Tribunal was given absolutely no basis upon which to conclude that the coin toss as performed was improper or that it casts any doubt on the reliability of the ensuing vote.

Having considered and dismissed all items of the Applicant's complaint regarding the vote and vote count, we turn to the Tribunal's disposition of the Applicant's request that the July 24, 1986 hearing be rescheduled. At the Tribunal's initial hearing into the Applicant's complaint, as detailed above, which took place on April 21, 1986, the Applicant presented **viva voce** evidence from Mr. Jules Beauregard whose evidence was referred to above, and from Mr. Roach. The testimony from Mr. Beauregard was



completed but the day's proceedings ended after Mr. Roach had only finished his evidence-in-chief. Cross-examination of Mr. Roach by the Intervener was to begin on the next scheduled day.

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By a notice dated May 1, 1986 the Tribunal advised the parties that the next scheduled hearing day would be July 24, 1986. Over a month later, on June 11, 1986, counsel for the Applicant wrote to the Tribunal stating that his clients could not attend the July 24th hearing because Mr. Roach and the other representatives of the Applicant would be on vacation for July and August; he requested, pursuant to instruction, that the matter be scheduled after September 24th. That letter provides as follows:

I have been advised by my client that Mr. Roach and a number of other witnesses will be on vacation during July and August. Accordingly, I have been instructed to request that the hearing be rescheduled for a date after September 24th, 1986, with the exception of October 8th, 9th, 10th and 14th, 1986.

Yours very truly,  
"Cyril J. Abbass"

Following the receipt of the Applicant's request the Tribunal considered rescheduling the hearing but due to its backlog was unable to provide a replacement date prior to December of 1986 or possibly even January of 1987. Moreover, the Respondent advised the Tribunal through a letter from its counsel that it was unable to agree to an adjournment of the July 24th hearing. As well, counsel for the Intervener advised the Tribunal that it could not agree to an adjournment of the July 24th hearing unless the matter



could be rescheduled before September 15th, a point before the Applicant wanted the matter rescheduled, in any event.

At no time was the Tribunal advised that the July/August vacation period for the Applicants presented a specific problem to any specific representative of the Applicant or proposed witness. It is not unusual for people to attend Tribunal hearings even though they happen to be on vacation. It was never suggested, for example, that any representative of the Applicant or proposed witness was out of the country or province or even the greater metropolitan area and thus actually unavailable to attend the hearing on July 24th. The Tribunal was simply advised that the witnesses were on vacation in July and August and that the matter should be rescheduled after September 24th. In the circumstances, and given that the matter could not be rescheduled by the Tribunal within a reasonable period, the Tribunal declined to cancel the July 24th hearing on the strength of the Applicant's June 11th request. Accordingly, it advised the parties by letter dated July 17, 1986 that it would convene the proceeding on July 24th as scheduled. At that hearing it would have been open to the Applicant to speak further to the matter of an adjournment if it so desired. We note that counsel for the Applicant had advised the Tribunal that he would be in attendance at the hearing if the Tribunal decided to proceed on July 24th.

On July 23, 1986, however, the day before the hearing, the Tribunal was advised that counsel for the Applicant, Mr. Abbass, was no longer acting for the Applicant. Further, on July 23rd the Tribunal received the following





telephone message from Mr. Roach:

No one representing the Canadian Union of Housing Employees, Local 1983 will be present at the hearing tomorrow morning because several complainants are away on vacation and in any event a telegram will be forthcoming explaining our definitive position in regard to the unfair procedures that have taken place regarding this case.

On July 24th the Tribunal convened its proceeding as scheduled. No one appeared for the Applicant. The Tribunal then turned to both the Intervener and Respondent to invite their presentation of evidence. Neither party gave testimony. Accordingly, the Tribunal invited submissions from the parties concerning the Applicant's complaint.

After the close of the proceeding the panel of the Tribunal was apprised of the following telegram from Mr. Roach and the Executive Board of the Applicant:

Operator 3578  
151 Front Street West  
Telephone: 860-5028/29  
Telegram dated July 24, 1986 - 9.12 A.M.  
Telegram relayed over the telephone on July 24, 1986 at 10.55 A.M.  
Telegram addressed to - T. Inniss [Tribunal Registrar]

As of July 22, 1986 Mr. Cyril Abbas has been discharged as Counsel representing the Canadian Union of Housing Employees Local 1983. The Tribunal was advised that certain of the complainants and witnesses would be away on vacation on the hearing date of July 24, 1986 with the usual request for a new date for the hearing. This request was made well in advance of the hearing date. The Tribunal has



denied this request. Also at the initial hearing in this matter, a vast amount of time was wasted by the Tribunal Chairperson and members in an unbelievable attempt to deny the complainants their rights of giving testimony.

It is also our opinion that one side member, Bill Walsh should have declared a potential or real conflict of interest in this matter before the Tribunal.

It is for these in part, very serious reasons, that as relayed to the Tribunal by telephone July 23, 1986, no verbal representation would be made at the hearing of July 24, 1986. The practices of the Ontario Service Labour Relations Tribunal will be reported to the appropriate authorities for a rectification of what we consider to be a flagrant denial of natural justice and in our opinion an abuse of power by certain personalities within the Tribunal structure. It is with great consideration that we feel utter disgust with the unfair practices of the Tribunal.

D.V. Roach  
Bill Williams  
Art Lombard  
John Abbott  
Ed Morgan  
The Executive Board of the Canadian Union of Housing  
Employees, Local 1983.

With respect to the alleged conflict of interest relating to "one side member, Bill Walsh", it may be noted that Bill Walsh was not one of the panel members in this matter. If the Applicant had any reason to believe that one of the actual side members had a conflict of interest, it should have raised the question at the earliest possible time. The hearings in this matter started on January 20, 1986, when the question of the Applicant's status was determined. No issue concerning an alleged conflict of interest was raised by the Applicant at that time or at any of its subsequent proceedings.

Faced with the stated refusal of the Applicant or any representative



thereof to attend the July 24th hearing, and having regard to the absence of notification of any specific problem of attendance relating to any particular proposed witness or representative of the Applicant, the Tribunal, at the July 24th hearing, deemed the Applicant's case closed and proceeded to the other parties for their evidence and submissions. As may be noted from the consideration of the complaint, we have given full weight to the completed evidence of Mr. Roach as given in examination-in-chief. We have thus taken his evidence at its highest. Moreover, we have assumed the truth of most all of the facts (albeit not the alleged conclusions) asserted in the complaint particulars, except as modified by Mr. Roach's own evidence. As well, we have given weight to the representations by way of clarification made by counsel for the Applicant at the outset of the hearing concerning the evidence the Applicant would be producing and the purpose it was intended to serve.

On the basis of these submissions and the evidence presented, as fully discussed above, the Tribunal has been given no cause to conclude that the representation vote as taken and counted does not disclose the true wishes of the employees. We are fully satisfied that both the vote and counting of the vote were fair and proper in all respects.

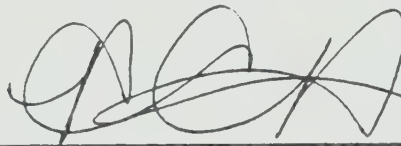
Accordingly, for the reasons set out above, the Tribunal declines to exercise its discretion and order the taking of another representation vote. Having regard to the fact that less than fifty percent of the employees who voted voted for the Applicant, the Applicant's application for certification is denied and the Intervener's bargaining rights are hereby reaffirmed.





Pursuant to the Tribunal's authority under section 41(1)(d) of the **Act** and in accordance with standard procedure (see Adams, G., **Canadian Labour Law, A Comprehensive Text** (1985, Canada Law Book, Aurora, Ontario) at para. 7.15 ("Other "Bars" to Certification"), p. 383), the Tribunal advises that it will not entertain another application for certification by the Applicant in respect of any of the employees in the bargaining unit within the period of six months from the date hereof.

Dated at Toronto, Ontario this 10th day of October , 1986.

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right.

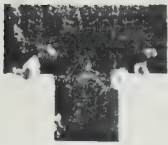
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Pamela C. Picher, Chairman  
For the Tribunal









T/0027/85

Crown Employees Collective Bargaining Act, R.S.O. 1980, C.108

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

BETWEEN:

ONTARIO PUBLIC SERVICE EMPLOYEES UNION

APPLICANT

-AND-

THE CROWN IN RIGHT OF ONTARIO

RESPONDENT

BEFORE:

J. H. Devlin	Vice-Chairman
W. Walsh	Member
R. Drennan	Member

FOR THE APPLICANT:

I. Roland  
Counsel  
Gowling and Henderson

FOR THE RESPONDENT:

L. M. McIntosh  
Counsel  
Ministry of the Attorney General

Peter M. Whalen appeared for Jerome Alexander Ambulance Service Limited.

HEARING:

March 6, 1987.





The application in this matter is dated November 25, 1985 and was brought pursuant to Sections 4, 5 and 11 of the Successor Rights (Crown Transfers) Act and Section 40 of the Crown Employees Collective Bargaining Act. It is the position of the Union that persons formerly employed by Jerome Alexander Ambulance Service Limited as ambulance attendants and now employed by the Ministry of Health are employees within the meaning of the Crown Employees Collective Bargaining Act and that the Union, as their bargaining agent, has certain rights as provided in the Successor Rights (Crown Transfers) Act. It is the position of the Ministry, however, that there has not been a transfer of an undertaking so as to accord the Union any rights under the Successor Rights (Crown Transfers) Act and that in any event, the persons whose status is in issue are excluded from the definition of employee contained in the Crown Employees Collective Bargaining Act.

The Ministry of Health first began licensing ambulance services in 1968 and at the present time, there are a number of different entities which provide ambulance service throughout the province of Ontario. These consist of private operators, municipalities, volunteers, hospitals or the Ministry of Health. In the case of private ambulance services, the operator prepares a budget and an operational plan which is submitted to the Ministry of Health annually. The Ministry funds all operating costs for the delivery of the service required at



approved staffing levels. The Ministry also owns all vehicles and equipment necessary to the operation of this service. The Ministry, however, plays no role in on-site management nor is it involved in labour relations except in cases in which the service is operated directly by the Ministry.

From approximately March of 1966 to November of 1985, ambulance service in Welland and Fort Erie was provided by Jerome Alexander Ambulance Service Limited ("the Ambulance Service"), a private operator licensed under the provisions of the Ambulance Act. For a number of years prior to 1985, full-time employees of the Ambulance Service were represented by the applicant Union and the last collective agreement covering these employees expired on April 1, 1984. In December of 1983, the Union was also certified to represent part-time employees and the Union entered into negotiations with the Ambulance Service in respect of both bargaining units. Negotiations, however, were unsuccessful with the result that a strike ensued in July of 1985 which was still in progress in November of that year. Subsequent to that time, the only evidence of any attempt to negotiate with the Ambulance Service took the form of a letter dated April 16, 1986 from Doug Dorling, a staff representative with the Union, to Dr. Alexander, the President of the Ambulance Service, proposing a resolution of the items in dispute.



On November 13, 1985, the licence of the Ambulance Service was suspended under Health Facilities Special Orders Act and the circumstances leading up to the suspension are not in dispute. In June of 1985, a hearing was held pursuant to the provisions of the Ambulance Act which resulted in a decision to revoke the licence of the Ambulance Service. There was, however, a request for review of this decision by the Minister of Health in accordance with Section 16 of the Act which provides that the Minister shall review the record, the decision and the reasons therefor and may confirm or alter the decision as he considers proper. Section 16 further provides that the Minister is required to give reasons for his decision within 30 days after he receives the request for review. Despite this, however, at the time of the hearing before the Tribunal in March of 1987, the panel was informed that the Minister had not reviewed the record as provided in the Ambulance Act. Miss McIntosh, who appeared for the Respondent Ministry, advised the panel that responsibility for preparation of the record rests with the party requesting the review or, in this case, with the Ambulance Service. As the Ambulance Service did not prepare the record as required, Miss McIntosh indicated that the legal branch of the Ministry of Health was in the process of completing preparation of the record upon which review by the Minister is contingent. In accordance with the provisions of the Ambulance Act, however, and pending a review by the Minister, the Ambulance Service was entitled to continue to operate.





On October 28, 1985, the Minister of Health served notice of his intention to propose to revoke the licence of the Ambulance Service pursuant to Section 6(c) of The Health Facilities Special Orders Act. This section provides that the Minister may propose to revoke the licence for a health facility where,

- (c) the conduct of the licensee or, where the licensee is a corporation, of the corporation or of an officer or director of the corporation affords reasonable grounds for belief that the health facility is not being or is not likely to be operated with competence, honesty, integrity and concern for the health and safety of persons served by the health facility.

The notice of October 28, 1985 set out a number of grounds in support of the proposed action and further advised Dr. Alexander, that in accordance with the Health Facilities Special Orders Act, the Minister would consider any explanations or representations offered by the licensee. By letter dated November 4, 1985, Dr. Alexander responded to the allegations contained in the notice and requested an opportunity to meet with the Minister to discuss the matters which had been raised. On November 13, 1985, the Minister advised Dr. Alexander that he found the explanations and representations which had been offered insufficient and that the licence of the Ambulance Service was being suspended effective that day. The Minister further advised Dr. Alexander that, in future, ambulance service would be provided directly by the



Ministry of Health. Finally, the Minister informed Dr. Alexander of his right to request a hearing before the Health Facilities Appeal Board and set out the steps to be taken in order to request such a hearing.

Subsequently in late November of 1985, a request for hearing was forwarded to the Minister and the hearing before the Health Facilities Appeal Board was scheduled for April 21, 1986. On that date, the hearing was adjourned at the request of counsel for the Ambulance Service. When the hearing reconvened in May of 1986, counsel for the Ambulance Service advised the Board that he had instructions to commence an application for judicial review to seek a declaration that Section 13(2) of the Health Facilities Special Orders Act is of no force and effect as it is contrary to the Canadian Charter of Rights and Freedoms and for an order quashing the licence suspension of the Ambulance Service. At this point, proceedings before the Health Facilities Appeal Board were adjourned to await the outcome of the application for judicial review. It was not until December of 1986 that the Ambulance Service actually served notice of its application for judicial review and Mr. Roland, who appeared on behalf of the applicant Union, advised the Tribunal that no steps have been taken to pursue this application.

Richard Armstrong is employed by the Ministry of Health as the Regional Manager of the Central Western Region,



Emergency Health Services and was involved in the Ministry's decision to operate the ambulance service in Welland and Fort Erie. Mr. Armstrong testified that a number of options were considered and in view of the Ministry's desire to normalize the delivery of ambulance service pending the outcome of proceedings in respect of the licence of the Ambulance Service, it was determined that the only viable alternative was to provide what was described throughout the hearing as an "Interim Service". Mr. Armstrong acknowledged that Dr. Alexander was convicted of fraud in connection with his use of Ministry funds and imprisoned for some time as a result. Mr. Armstrong also testified that if the Ministry is successful in maintaining the suspension or revocation of the licence of the Ambulance Service, it is the Ministry's intention to make a request for proposals and to select a private operator for the service.

Prior to assuming responsibility for the operation of the Ambulance Service in November of 1985, Mr. Armstrong testified that he received a telephone call from Doug Dorling concerning the manner in which the Ministry proposed to staff the Interim Service. Mr. Armstrong testified that he explained to Mr. Dorling that the Ministry would be hiring employees on a contract basis to provide ambulance service to Welland and Fort Erie at previously approved staffing levels. Mr. Dorling questioned Mr. Armstrong as to whether employees of the Ambulance Service would be offered positions and Mr. Armstrong indicated





that anyone interested was free to apply. Mr. Armstrong advised Mr. Dorling that the Ministry intended to establish a centre in the area for receiving applications and would contact community colleges to determine if graduates of those ambulance programmes would be interested in working for the Interim Service. Mr. Dorling, however, requested that present employees be given the first opportunity to apply for positions and asked that Mr. Armstrong meet with these employees as a group.

Mr. Armstrong agreed to Mr. Dorling's proposal and a meeting with employees of the Ambulance Service was scheduled for November 14, 1985. At this meeting, Mr. Armstrong testified that he explained to those present that the licence of the Ambulance Service had been suspended, that a hearing had been scheduled to contest the suspension and that following the outcome of that proceeding and any other further appeals, a decision would be made concerning which entity would provide ambulance service. Mr. Armstrong testified that he explained that if the licence suspension was upheld, the Ministry did not intend to continue to operate the service and that a new operator would be selected. Mr. Armstrong indicated that if the Ambulance Service was successful in regaining its licence, it was his view that employees would remain on strike and would be in essentially the same position as they were prior to November 13, 1985. In the meantime, however, Mr. Armstrong indicated that these individuals were welcome to apply for positions with the Ministry's Interim Service. Mr. Armstrong testified that a question was raised as



to whether all present employees of the Ambulance Service would be hired and he stated that it would be necessary for each individual to submit an application and to meet Ministry standards. Mr. Armstrong expressed the view that there was no obligation upon the Ministry to hire employees of the Ambulance Service. Mr. Armstrong testified that had these employees not been available, the Ministry would have hired staff from local community colleges or obtained personnel from "G.O. Temp", a service operated by the Civil Service Commission which provides employees to government ministries for temporary work assignments. In any event, at the meeting on November 14th, Mr. Armstrong indicated that individuals who were hired would work on contract for six months. Mr. Armstrong explained that he was optimistic that by the end of this period, proceedings in connection with the licence of the Ambulance Service would be concluded.

Following Mr. Armstrong's remarks, Mr. Dorling spoke with employees present at the meeting and advised them that, in his view, it was in their interest to apply to the Interim Service and, in fact, the majority submitted applications. Mr. Armstrong testified that although two of these applications revealed that the individuals had criminal records, Mr. Dorling requested that the Ministry waive its requirement in this regard as these individuals had previously worked for the Ambulance Service. Mr. Armstrong indicated, however, that the applications



would be forwarded to Ministry counsel for an opinion and testified that, in fact, one individual's application was subsequently accepted. It was necessary for the other individual to obtain a pardon and upon doing so, he replaced an employee who left the employ of the Interim Service. Mr. Armstrong testified, however, that had there been no vacancy, a position would not have been made available as there was no obligation upon the Ministry to hire employees of the Ambulance Service.

Mr. Armstrong also testified that there was one employee of the Ambulance Service who applied to the Ministry and whose application was denied. Although Mr. Armstrong believed that there was more than one employee of the Interim Service who had not previously worked for Jerome Alexander Ambulance Service, a comparison of staff lists reveals only one employee in this category. It should be pointed out at this juncture, however, that while there were five employees in supervisory positions with the Ambulance Service, they did not continue to work in any supervisory capacity with the Interim Service but were offered the same contracts with the Ministry as were other employees. Supervisory duties for the Interim Service have been fulfilled by employees of the Ministry working in the Niagara Falls District Ambulance Service which is adjacent to the area serviced by the Interim Service and which is also operated directly by the Ministry. It would appear that an employee of the Niagara Falls Service has also performed clerical duties for the Interim





Service as no members of the office staff of the Ambulance Service were hired by the Ministry. Time spent in the performance of such clerical functions, however, has been charged directly to the Interim Service.

As indicated previously, employees of the Interim Service were each required to sign a six-month contract with the Ministry which expired on May 15, 1986. At that time, a subsequent six-month contract was executed and in November of 1986, a one-year contract was signed which is due to expire on November 30, 1987. Mr. Armstrong testified that whereas employees of the Ambulance Service were paid \$9.60 per hour, employees of the Interim Service are paid \$11.50 per hour. The benefits received by these employees, however, are limited and Mr. Armstrong testified that they differ from the benefits previously provided by the Ambulance Service. While initially employees retained the uniforms which they wore while employed by the Ambulance Service, the Ministry has now purchased uniforms bearing the name "Welland Interim Ambulance Service".

The Ambulance Service previously operated out of a building owned by Dr. Alexander from which he also operated a number of transportation services. Prior to November 13, 1985, as part of the operating cost of the Ambulance Service, the Ministry paid a fee for the portion of the building used by the Service. When the Ministry began to operate its Interim Service,



it removed from this building the vehicles, equipment and supplies which were the property of the Ministry necessary to the provision of the ambulance service. Mr. Armstrong testified that the Ministry did not remove other property of Dr. Alexander such as a generator in the office or radio equipment for which the Ministry now has no need as it operates a central dispatch service.

Mr. Armstrong testified that it was not feasible for the Ministry to operate the Interim Service out of a building owned by Dr. Alexander. Since November 15, 1985, therefore, the Ministry has operated its Service from two trailers which it leases on a month-to-month basis, one of which is located at the hospital in Welland and the other at the hospital in Fort Erie. Mr. Armstrong testified, however, that the Ministry of Government Services has assumed responsibility for the cost of constructing an ambulance base on hospital property in Fort Erie which in due course will be leased to the ambulance service operating in Welland and Fort Erie. Mr. Armstrong explained that this particular facility was planned prior to the licence suspension of the Ambulance Service and the Ministry proceeded with construction subsequent to November of 1985 as regardless of which entity operates the service, an ambulance base is required. The Ministry of Government Services has also contracted to renovate a building in Welland for use of the Interim Service and Mr. Armstrong testified that the Ministry has negotiated a



short-term lease with a cancellation clause. Mr. Armstrong explained that the use of the facility is intended to be temporary and that the renovation was undertaken to improve conditions of those presently working out of the trailers.

Prior to considering the arguments advanced by the parties, it is appropriate to set out the remarks made by Mr. Whalen to the Tribunal on behalf of Jerome Alexander Ambulance Service Limited. Mr. Whalen indicated that the Ambulance Service is optimistic that it will be successful in proceedings which have been undertaken to regain its licence. In addition, Mr. Whalen expressed concern with respect to the potential effect of the Tribunal's decision on the ability of the Ambulance Service to operate as it has in the past. Although Mr. Whalen also expressed concern with any suggestion that the ambulance service is a Crown agency, this was not a position put forward by the Union in this case.

Mr. Roland, on behalf of the Union, advanced two submissions, the first of which was to the effect that the Ministry's operation of the Interim Service resulted in the transfer of an undertaking in accordance with The Successor Rights (Crown Transfers) Act and that the Union has bargaining rights in respect of employees of the Interim Service in accordance with the provisions of that Act. Mr. Roland contended that the undertaking which has been transferred is the ambulance





service which has its own discrete nature and the Ministry is operating this service with virtually the same individuals and the same equipment in the same area and with the same authority. Mr. Roland further submitted that the transfer need not be voluntary nor is it necessary that any consideration change hands. In support of this proposition, Mr. Roland referred to Service Employees Union, Local 268 v. Thunder Bay Ambulance Services Inc. [1978] O.L.R.B., Rep. May 467. In that case, the Ministry of Health determined that it would be more cost effective to have one rather than two ambulance services operating in Thunder Bay. In the result, two hospitals which had previously provided ambulance service discontinued their services and a notice was issued by the Ministry inviting proposals for the operation of one ambulance service in the Thunder Bay. A proposal was subsequently accepted by which the Ministry licensed a service to be operated by the former director of one of the hospital services. The new service employed all who applied from the former services and maintained their rates of pay and seniority for vacation purposes. Their benefits, however, were newly established. In that case, it was determined that there had been a sale of a business in accordance with the provisions of the Labour Relations Act as certain essential elements of the predecessors' businesses had been transferred to the newly-established ambulance service. These consisted of the entitlement to exclusive use of the assets owned by the Ministry



and secondly, the predecessors' management, organization and employees were also transferred.

Mr. Roland contended that there has been a similar transfer in this case and also referred to Service Employees Union, Local 183 v. Riverview Manor operated by Daynes Health Care Ltd. [1983], O.L.R.B., Rep. Sept. 1564 in which case a sale of a business was also found to have taken place. There, considerable emphasis was placed upon the fact that the licence to operate a nursing home was transferred from the predecessor to the entity found to be the successor employer. Although the Ministry of Health does not require a licence to operate an ambulance service, Mr. Roland submitted that like the successor employer in Riverview Manor, the authority to operate an ambulance service in Fort Erie and Welland which previously belonged to Jerome Alexander Ambulance Service now rests with the Ministry of Health.

Mr. Roland further submitted that the ambulance attendants employed in the Interim Service are employees within the meaning of The Crown Employees Collective Bargaining Act. Mr. Roland contended that the fact that the Ministry may not operate the service in the future does not mean that the persons employed by the Service are engaged "for a project of a non-recurring kind" within the meaning of Section 1(f) (vii) of The Crown Employees Collective Bargaining Act so as to be excluded



from the definition of employee for purposes of the Act. If, by this means, bargaining rights could be lost, Mr. Roland contended that the intent of the legislation would be defeated. Mr. Roland pointed out that the first action to suspend the licence of the Ambulance Service took place almost two years previously and he suggested that the Ministry has done little to advance the proceedings. Mr. Roland submitted that the Ministry is required by legislation to provide ambulance service and that regardless of which entity operates the service, the work is of a recurring or on-going nature. In these circumstances, Mr. Roland requested that we find that the ambulance attendants working for the Interim Service in Welland and Fort Erie are employees within the meaning of The Crown Employees Collective Bargaining Act and included in the main bargaining unit of Public Servants represented by the Union.

It was the submission of Miss McIntosh, on behalf of the Ministry, that the evidence does not support the conclusion that there has been a transfer of an undertaking within the meaning of The Successor Rights (Crown Transfers) Act. In order for such a transfer to take place, Miss McIntosh contended that something in the form of a going concern must pass from the predecessor to the successor employer and it is not sufficient that another employer merely begin to operate a separate and parallel business. In this case, it was submitted that there are a number of factors which are significant. Firstly, the assets





of the Ambulance Service did not pass to the Interim Service nor was there any transfer of managerial skills which was found to be so vital in Thunder Bay Ambulance referred to by the Union. In addition, there was no consideration nor any transfer of good will. While a number of employees of the Ambulance Service now work for the Interim Service, Miss McIntosh contended that their skills are not necessary to the operation of the Interim Service as other attendants could have been hired but that, in any event, this is not sufficient to find that there has been a transfer of an undertaking. Miss McIntosh also submitted that the Riverview Manor decision referred to by Mr. Roland is distinguishable as, in that case, there was both consideration and the transfer of an asset, namely land.

Miss McIntosh submitted that what occurred in this case more closely resembles the situation in Canadian Union of Public Employees v. Metropolitan Parking Inc. [1979], O.L.R.B. Rep. Dec. 1193. In that case, Toronto Auto Parks operated an airport parking lot by virtue of a three-year contract with the Federal Government. The lot and equipment were owned by the government and monies collected from customers were remitted to the crown. In turn, the government paid the operator a fixed fee for its services. When the contract expired, a new contract was let by public tender to Metropolitan Parking which hired the predecessor employer's general manager and a number of its supervisors and employees. It was found, however, that real



management authority rested at a higher level. In all the circumstances, the Labour Relations Board concluded that there had not been a sale of a business. As in Metropolitan Parking Inc., Miss McIntosh requested that we find that the Ministry did not acquire the business of the Ambulance Service and as a result, there has not been a transfer of an undertaking in accordance with The Successor Rights (Crown Transfers) Act. Miss McIntosh also referred to London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. and Price Waterhouse Limited and Canadian Imperial Bank of Commerce [1983], O.L.R.B., Rep. Oct. 1706. In that case, the Canadian Imperial Bank of Commerce appointed Price Waterhouse as receiver and manager of a nursing home when the operator of the home failed to pay its indebtedness in accordance with a security agreement and debenture with the bank. There, the Labour Relations Board found that the bank was managing the business solely to protect its security and was not a successor employer within the meaning of the Labour Relations Act. Miss McIntosh suggested that the decision is useful because, like the Union in the Price Waterhouse Limited decision, the Union in this case still holds bargaining rights although it was acknowledged that it may be difficult to exercise those rights at the present time.

In respect of the second aspect of the Union's argument, Miss McIntosh submitted that those employed as ambulance attendants are engaged "for a project of a non-



recurring kind" and are, therefore, excluded from the definition of employee within the meaning of the Crown Employees Collective Bargaining Act. In this regard, Miss McIntosh referred to a decision of another panel of the Tribunal in Ontario Public Service Employees Union and Crown in Right of Ontario (Ministry of Health), T/19/77 in which the individual whose status was in issue had been appointed to the staff of a psychiatric hospital to assist in the phasing out of the mental retardation unit. Miss McIntosh pointed out that, in that case, the individual's contract was renewed as the phasing out took longer than anticipated. In addition, no definite terminal date could be fixed for the completion of the phasing out because of the complexity and difficulty in placing residents. Despite this, however, the Tribunal determined that the plan to phase out the mental retardation unit was a project of a non-recurring kind and, accordingly, the individual in issue was not an employee within the meaning of the Crown Employees Collective Bargaining Act.

Similarly, Miss McIntosh submitted that the Ministry's operation of the Interim Service is of a non-recurring nature and that the project continues only by virtue of the fact that the legal proceedings in relation to the Ambulance Service are still outstanding. While Miss McIntosh acknowledged that perhaps the Ministry could exert further efforts to advance these proceedings, it was submitted that this cannot alter the nature





or bona fides of the project. In the result, Miss McIntosh requested that the Tribunal find that the ambulance attendants employed in the Interim Service have been engaged for a project of a non-recurring kind and are, therefore, excluded from the definition of employee within the meaning of the Crown Employees Collective Bargaining Act.

For the purposes of this case and given the nature of the relief sought, it would appear that the Union's argument in respect of the application of the Successor Rights (Crown Transfers) Act is an alternative position. Nevertheless, as a substantial portion of the parties' argument pertained to the application of the Act, we also find it appropriate to deal with this issue.

The Successor Rights (Crown Transfers) Act affords certain rights to the bargaining agent in circumstances where an undertaking has been transferred from an employer to the Crown. "Transfer" is defined in the Act as a "conveyance, disposition or sale" and "undertaking" is defined as a "business, enterprise, institution, program, project, work or any part of them". Although the terminology in the Labour Relations Act is somewhat different, providing as it does for certain rights where an employer "sells his business", the word "sells" in that Act is defined to include "transfers". In Thorco Manufacturing Co. 65 CLLC 787 which is referred to in Thunder Bay Ambulance Services



Inc., supra, the Labour Relations Board discussed the components of the statutory definition in the following terms:

"The word 'transfers' is obviously a term of wide signification and unless restricted by the context is capable of describing a multitude of transactions whether by sale, exchange, gift, trust or otherwise by which property, rights, interest, etc. are transmitted absolutely, conditionally, etc. or by operation of law from one person to another."

In our view, this statement applies with equal force to the word "transfer" as it is used in the Successor Rights (Crown Transfers) Act.

Although there is little in the way of jurisprudence emanating from the Tribunal as to what constitutes the transfer of an undertaking with the meaning of the Successor Rights (Crown Transfers) Act, the purpose and intent of the relevant sections of the Labour Relations Act are similar and in this respect, the jurisprudence developed under that Act is of assistance. In determining whether there has been a sale of a business with the meaning of the Labour Relations Act, the Labour Relations Board has considered a number of indicia as is evident from the following comments of the Board in Culverhouse Foods Ltd. [1976], O.L.R.B., Rep. Nov. 691:

" ... the cases offer a countless variety of factors which might assist the Board in its analysis: among other possibilities the presence



or absence of the sale or actual transfer of goodwill, a logo or trademark, customer lists, accounts receivable, existing contracts, inventory, covenants not to compete, covenants to maintain a good name until closing or any other obligation to assist the successor in being able to effectively carry on the business may fruitfully be considered by the Board in deciding whether there is a continuation of the business. Additionally, the Board has found it helpful to look at whether or not a number of the same employees have continued to work for the successor and whether or not they are performing the same skills. The existence or non-existence of a hiatus in production as well as the service or lack of service of the customers of the predecessor have also been given weight. No list of significant considerations, however, could ever be complete; the number of variables with potential relevance is endless. It is of utmost importance to emphasize, however, that none of these possible considerations enjoys an independent life of its own; none will necessarily decide the matter. Each carries significance only to the extent that it aids the Board in deciding whether the nature of the business after the transfer is the same as it was before, i.e. whether there has been a continuation of the business.

..."

In Culverhouse Foods Ltd. and a number of other decisions, particular emphasis has also been placed upon the nature of the work performed. At the same time, in Thunder Bay Ambulance Services Inc., supra, it was noted that similarity in the nature of the work performed is not necessarily conclusive in determining whether there has been a sale of a business or, the purposes of this application, the transfer of an undertaking:

"

...

15. That part of the predecessor's business which is at issue can best be described as the





management and operation of a group of assets owned by the Ministry of Health, for the purpose of providing ambulance service in the Municipality of Thunder Bay. The alleged successor manages and operates these same assets for the same purpose and therefore its business can be described in identical terms. This similarity of description, however, does not necessarily establish a 'continuum' of the predecessor's business. In the absence of any direct contact between predecessor and successor, in the absence of the successor purchasing anything from the predecessor, and in the absence of the predecessor receiving any consideration from the alleged successor, it might be said that the predecessor employer did not sell or transfer its business but rather that it went out of business and a different albeit parallel business, took its place. In the context of a regulated monopoly, the lack of hiatus and the similarity of function cannot be the overriding considerations. The issue must be determined on the basis of what, if anything, was transferred to the alleged successor.

..."

We agree with Miss McIntosh that a transfer of an undertaking requires that there be a transmission from one person or one entity to another and that such a transfer does not occur in circumstances where another employer establishes a separate and parallel undertaking. There must be a continuum of the predecessor's business or undertaking and, therefore, the fundamental task of the Tribunal is to determine the nature of the predecessor's undertaking in order to ascertain whether that has been transferred to the Crown.

As in Thunder Bay Ambulance Services Inc., supra, the essence of the predecessor's business in this case can be



described as the management and operation of a group of assets owned by the Ministry of Health for the purpose of providing ambulance service in Welland and Fort Erie. There is no dispute that no consideration passed between the Ambulance Service and the Ministry of Health and that there was no change in ownership of the assets necessary to operate the ambulance service as these remained throughout the property of the Ministry of Health. Although a number of supervisory personnel of the Ambulance Service were subsequently employed by the Interim Service, they did not continue to exercise any supervisory responsibilities and to this extent, there was no transfer of managerial skills. Having said this, however, and on the basis of the evidence as a whole, we are satisfied that what took place involved the transfer of an undertaking from an employer to the Crown in accordance with the Successor Rights (Crown Transfers) Act.

As in Thunder Bay Ambulance Services Inc., supra and Riverview Manor, supra, one of the most essential elements of the undertaking operated by the Ambulance Service was the licence issued pursuant to the Ambulance Act. This licence gave to Jerome Alexander Ambulance Service Limited the right to provide ambulance service within a defined area and to have exclusive use of certain assets of the Ministry of Health necessary to the operation of this service. While the Ministry of Health does not require a licence to operate the Interim Service, the right to provide service to the residents of Welland and Fort Erie and the



right to use Ministry assets for this purpose was transferred from the Ambulance Service to the Ministry of Health as operator of the Interim Service.

Although Mr. Roland submitted that the provision of ambulance service is so highly regulated in the province of Ontario that real management authority rests with the Ministry, it is clear that there are some supervisory responsibilities exercised at the local level. The Tribunal was advised that the Ministry was not involved in on-site management prior to November of 1985 and that subsequently, supervisory responsibilities in respect of the Interim Service were exercised by employees of the Niagara Falls District Ambulance Service. In the absence of evidence, however, as to the nature and significance of those responsibilities, the Tribunal cannot conclude that the fact that managerial skills were not transferred to the Ministry of Health is a determining factor. Nevertheless, it is significant that employees of the Ambulance Service continue to perform identical job functions which are intrinsic to the operation of the Interim Service. Although the licence of the Ambulance Service has merely been suspended at this point, this effectively precludes its operation of an ambulance service. Whether the Ambulance Service will ultimately be successful in regaining its licence, in the meantime, the operation of the ambulance service has been transferred to the Crown.





Although the Union made some attempt to negotiate with Dr. Alexander subsequent to November of 1985, the letter dated April, 1986, involved a proposal for the resolution of outstanding issues which was to take effect only in the event that Dr. Alexander was successful in setting aside the licence suspension of the Ambulance Service at the hearing which was then scheduled to take place on April 21, 1986. There is nothing contained in the letter, therefore, which detracts from the position being advanced by the Union in its application before the Tribunal.

It is necessary then to consider the second aspect of the Union's application, namely whether ambulance attendants employed by the Interim Service are employees within the meaning of the Crown Employees Collective Bargaining Act. In our view, this issue must also be determined in the Union's favour and it cannot be said that the ambulance attendants are excluded from the definition of employee contained in the Act by virtue of the fact that they have been engaged "for a project of a non-recurring kind". As noted in Ontario Public Service Employees Union and the Crown in Right of Ontario (Ministry of Health), supra, in dictionary terms, a "project" is defined as a "plan", "scheme", or a "planned undertaking". While we agree that there may be a project of a non-recurring kind for which there is no definite termination date and for which employees may work over the period of more than one contract, nevertheless, the



"project" is a reference to the plan or undertaking and not simply to the operation or management of the undertaking by the Ministry. To find otherwise would result in the definition of employee being dependent upon the Ministry's intention with regard to its future operation of any individual ambulance service or similar undertaking. Were individuals to be excluded from the definition of employee within the meaning of the Crown Employees Collective Bargaining Act on this basis, we believe that this would have been clearly expressed in the legislation. The fact, therefore, that at some time in the future the Ministry may no longer operate the Interim Service because Jerome Alexander Ambulance Service Limited is successful in regaining its licence or, alternatively, because a new operator is selected is not sufficient to find that the ambulance attendants employed in the Interim Service are engaged for a project of a non-recurring kind. In contrast to the phasing out of the mental retardation unit in Ontario Public Service Employees Union and the Crown in Right of Ontario (Ministry of Health), supra, there is no "project" which can accurately be described as one of a "non-recurring kind".

As it was not suggested that ambulance attendants working for the Interim Service would be excluded from the definition of employee under any other ground, we find them to be employees within the meaning of the Crown Employees Collective Bargaining Act. In these circumstances, it was agreed that they



would be included in the main bargaining unit represented by the Union. In the event that it becomes necessary, we shall remain seised for purposes of implementation of our decision.

DATED AT TORONTO, this 8th day of June , 1987.

Jane H. Devlin  
Jane H. Devlin Vice-Chairman  
For the Tribunal











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Crown Employees Collective Bargaining Act, R.S.O. 1980, C. 108

**ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL**

T/0031/85

**BETWEEN:**

Mr. Trevor Murdough

Complainant,

- and -

Ontario Liquor Boards Employees'  
Union

Respondent

- and -

Liquor Control Board of Ontario

Intervenor

**BEFORE:**

M. Mitchnick, Alternate Chairman  
W. Walsh, Member  
R. Drennan, Member

**FOR THE COMPLAINANT:**

T. Murdough

**FOR THE RESPONDENT:**

L. Steinberg  
J. Chaykowsky  
L. Perrin

**FOR THE INTERVENOR:**

R. MacDougall

**HEARING:**

March 5, 1987



## DECISION

This is a complaint under section 32 of the Crown Employees Collective Bargaining Act, alleging that the complainant has been dealt with by the respondent contrary to the provisions of section 30 of the Act. Section 30 provides:

An employee organization shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees, whether members of the employee organization or not.

The complainant is a "part-time" or "temporary", store clerk and began working for the intervenor LCBO in September of 1984. The complainant acknowledged that the manner in which the employer promotes part-time employees to full-time has been a source of substantial discontent amongst the part-time employees. That discontent was exacerbated at about the time the complainant was hired when 4 vacancies for full-time positions in the bargaining unit were awarded by the employer to individuals with relatively low seniority. The filling of such vacancies is dealt with by Article 30.4 of the collective agreement, which provides:

The Boards agree to give consideration to the qualifications and ability of part-time store cashiers and temporary employees to perform the duties of a vacant position before going outside the Collective Agreement to fill permanent positions. Where, in the opinion of the Boards, two (2) or more such employees are relatively equal and one (1) of them is to be appointed to the vacancy, length of service shall be a consideration.

The Union was getting so many complaints from part-time employees,





particularly over these last 4 vacancies that were filled by the employer, that the executive decided to call a general meeting to discuss the problem. The Union followed its normal practice of posting notices of the meeting in each of the store's lunch-rooms, and in the notice specified that the purpose of the meeting was to discuss "temporary employees" and "grievance procedure".

That meeting took place on a Sunday (December 16th, 1984) so that all interested employees would be free to attend, and it was in fact attended by some 25 employees, including the complainant. For roughly four hours the meeting discussed the problems with the way the employer was filling full-time vacancies, and what could be done about it. Although the problem had been discussed with management many times, no satisfactory resolution had been forthcoming. The conclusion of the meeting was that the only option left open to the Union was to grieve. The Union therefore invited any of the employees present who were concerned about not being given the opportunity for full-time employment to file a grievance at the meeting, and 15 of the 25 employees present did so. The complainant was not one of those employees who elected to file a grievance.

All of these part-time grievances were immediately lodged with the employer and all were denied at Stages One and Two of the grievance procedure. Prior to posting the grievances on to arbitration, Mr. Perrin, the zone representative, held a meeting with Mrs. Chaykowsky, the Union's Classification Officer, and Mr. Martin Levinson, the Union's outside legal adviser. Mr. Levinson explained that the language of the collective agreement was very weak



from the Union's point of view, in that the employer's only obligation was to give "consideration" to the part-time employees, and to their relative seniority, in the filling of any vacancies. It was decided, however, that the way things were going, the Union had nothing to lose by proceeding with the grievances to arbitration. Mr. Levinson accordingly advised the Union to make its selection of the "best case" it had amongst the various grievances filed, and to proceed with that case to arbitration in order to test the matter.

That is what the Union did. The employer, however, was desirous of exploring whether an accommodation could be reached which would avoid the necessity of litigation, and made an offer of settlement which was confirmed in the following letter on June 18, 1985, to Mrs. Chaykowsky:

This refers to the conversation of June 17, 1985 regarding the subject grievance.

The following is proposed as a settlement of the subject grievance and of the grievances contained on the attached listing:

- (a) The Board undertakes that the grievor, D. Stewart, will be appointed to the next available regular vacancy occurring in the geographic area of her present store #24, Port Colborne.
- (b) All other grievors on the attached listing will be grouped in descending order of aggregate earnings since employed by the Board to the date of grievance and will be offered future regular positions as they occur within each geographic area pertinent to the store in which the grievor is currently employed.
- (c) Each grievor at the time of eligibility for regular appointment must be deemed by the Board as suitable in terms of satisfactory performance and having a current application (less than one year old) for regular employment on file with the Board.



Should this proposal be considered as acceptable signature and return of this letter to that effect is requested.

Many part-time employees have early hiring dates but in fact have only a limited attachment to the employer's work force, and thus the criteria of "aggregate earnings" was set out as a more meaningful way of defining "seniority" for the purpose of promotion to full-time vacancies. Apart from that question of definition, however, what the employer was in essence offering to do was to slot the complaining employees into the vacancies as they arose strictly according to seniority (subject only to the minimal requirements of ability set out in subparagraph (c)).

Given the weakness in the collective agreement language itself, the Union was ecstatic over the proposal put forward by the employer, and called a meeting of the grieving employees, once again by the usual procedure of posting notices in the lunch-rooms, to discuss it. That meeting resulted in acceptance of the employer's proposal by the grievors and the Union, and a promotion list of the 15 grievors was established in accordance with paragraph (b) of that proposal.

Shortly thereafter, the complainant says that he and other part-time employees learned of the settlement that the grievances of those 15 employees had produced. He testified that he thought that the settlement (i.e. "the list") was unfair to the other part-time employees, and that he was upset. Asked in cross-examination exactly what it was about "the list" that he considered unfair,





the complainant conceded that his problem really came down to the fact that he wasn't on it. He testified that it was his view that either all of the part-time employees ought to be similarly placed on such a "hiring" list, or the list ought to be done away with altogether.

The complainant, a straightforward, honest witness throughout, acknowledged that there was nothing inadequate in the notice given by the Union of the meeting held in December to discuss this problem, and that indeed the Union had done everything it could reasonably be expected to do to get employees to come out to the meeting to protect their interests. The complainant, for his part, was at the meeting, but was new in his employment, and, for his own reasons, elected not to participate with the others in the filing of a grievance. The complainant does not suggest there is anything the Union could do about that. The meeting was a lengthy one, with full discussion, and there is no suggestion that the complainant did not have a full opportunity to ask any questions he might have had about the nature of the problem, or the impact it might have upon him.

Nor did the complainant reconsider and seek to file a grievance at any time in the weeks during which these grievances were being processed on to arbitration. All that the complainant says is that, having learned what the result of those grievances had been, by way of settlement (which, it must be observed, was the kind of thing the grievances had been intended to produce by way of arbitration), he wished to be included in the group affected. But, while the Union has advised the Tribunal that it would be more than happy to



accommodate the complainant, the employer states that it entered into the settlement in good faith on the basis of 15 employee names (who had signified their interest by their grievances), and is not now prepared to make the settlement open-ended to accommodate additional employees who now decide to come forward. The Union obviously is not in a position to accommodate the complainant on its own, and the question is simply whether the entering into by it of the settlement which produced the full-time hiring list of the 15 was in breach of the duty owed to the members of the bargaining unit under section 30 of the Act.

We find that it was not. Fundamental to a complaint of this nature is the access afforded to the employees at large to participate in the process which led to the settlement now being impugned. As noted, the complainant does not take issue with the manner in which the Union did its best to involve all employees in the process. The complainant himself was at the meeting when employees wishing to assert their interest in full-time vacancies were asked to grieve, and the complainant decided on his own not to do so. It was necessary for both the employer and the Union to know who the interested employees were at the time they were dealing with the issue, and it is not appropriate for the complainant to seek to raise his interest only after the grievances have, in effect, been successful. It appears to us that the Union, for its part, acted fairly and honestly toward the members of the bargaining unit in attempting to grapple with the problem of full-time promotions, and no appropriate basis has been put forward by the complainant for the Tribunal now to unravel the settlement it achieved.



The complaint is accordingly dismissed.

.. DATED in Toronto, Ontario this 15th day of April, 1987.

A handwritten signature in cursive script, appearing to read "M. Mitchnick".

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M. Mitchnick, for the Tribunal











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T/36/85

T/37/85

Crown Employees Collective Bargaining Act, R.S.O.  
R.S.O. 1980, c. 180

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

Between:

Ontario Public Service Employees Union

Applicant

- and -

The Crown in Right of Ontario  
P. Barnes, E.M. Sorin, S. Wolnik  
(Ministry of Community and Social Services)

Respondent

Before:

M.G. Mitchnick, Chairman  
W. Wright, Member  
M.J. Sullivan, Member

For the Applicant:

I. Roland, Counsel  
Gowling and Henderson  
Barristers and Solicitors

For the Respondent:

D. Costen, Counsel  
Legal Services  
Ministry of Community and Social Services

Hearing:

October 7, 1986



### DECISION

This is a complaint under Section 32 of the Crown Employees Collective Bargaining Act, alleging that the respondents have acted contrary to Section 29 of the Act. Section 29(1) provides:

No person who is acting on behalf of the employer shall participate in or interfere with the selection, formation or administration of an employee organization or the representation of employees by such an organization, but nothing in this section shall be deemed to deprive the employer or any person acting on behalf of the employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

The facts upon which the complaint rests were placed before the Tribunal by way of an agreed statement. On February 4, 1986, the grievors, employees of The Ministry of Community and Social Services at the Children's Psychiatric Research Institute in London, lodged grievances with their immediate supervisor grieving that the employer improperly denied them the status of a regular part-time classified position and sought by means of remedy that they be properly classified as regular part-time staff and to be classified and receive entitlements due to them under the collective agreement. On February 12, 1986, the grievors were advised by their immediate supervisor that there had been no violation of the collective agreement and the grievance was denied. On February 18, 1986, the staff representative wrote directly to Peter Barnes, the Deputy Minister of the Ministry of Community and Social Services regarding the status of the aforementioned grievances. That letter read:

This is to advise that the reply received at Stage 1 to the above-noted grievance is not satisfactory; therefore, we hereby refer the grievance to Stage 2 in accordance with Article 27 of the collective agreement.

A copy of the grievance is enclosed.

As I am acting on behalf of the grievor, I would ask that all correspondence be addressed to me and that there





be no direct contact with the grievor by a member of Management regarding this matter.

Please have your designee contact me to arrange a mutually agreeable date, time and location for the Stage 2 meeting.

No copy of the same letter was directed to the Administrator of C.P.R.I.

Copies were shown, however, as going to the individual grievors.

The local practice at C.P.R.I. with respect to responding to the grievances at the stage 2 level is to provide grievors with written responses to their grievances. It is the practice of the management at C.P.R.I. as a "courtesy", they state, to provide a copy of such responses to properly designated union representatives.

Upon advice received by the management of C.P.R.I. from the Employee Relations Division of the Ministry on February 6, 1986, the management at C.P.R.I. decided on this occasion not to hold a stage 2 grievance meeting and to simply respond to the grievance by writing to the grievors denying the grievances. Notwithstanding the Union's letter of February 18, 1986, on March 6, 1986, Susan Wolnik, acting for the administrator, wrote to the grievors indicating to them that their grievances had been denied. That letter read as follows:

Further to your Stage 2 Grievance received 1986 February 20 regarding Regular Part-Time Status, it is my considered opinion that as there has been no violation of the Collective Agreement, your grievance is denied.

Contrary to local practice described above, the union was not copied on any of the responses. The Ministry has indicated to the union that the refusal to copy the union on these letters was an administrative oversight and that there was no intention to interfere with the union's right to represent the grievors. The respondents further acknowledge that a stage 2 meeting ought to have been held in the aforementioned grievances and will undertake to adhere to the provisions of Article 27.3.3 in the future.



The relevant provisions of "Article 27 Grievance Procedure" read:

- 27.1 It is the intent of this Agreement to adjust as quickly as possible any complaints or differences between the parties arising from the interpretation, application, administration or alleged contravention of this Agreement, including any question as to whether a matter is arbitrable.
- 27.2.1 An employee who believes he has a complaint or a difference shall first discuss the complaint or difference with his supervisor within twenty (20) days of first becoming aware of the complaint or difference.

- 27.2.2 If any complaint or difference is not satisfactorily settled by the supervisor within seven (7) days of the discussion, it may be processed within an additional ten (10) days in the following manner.

STAGE ONE

- 27.3.1 The employee may file a grievance in writing with his supervisor. The supervisor shall give the grievor his decision in writing within seven (7) days of the submission of the grievance.

STAGE TWO

- 27.3.2 If the grievance is not resolved under Stage One, the employee may submit the grievance to the Deputy Minister or his designee within seven (7) days of the date that he received the decision under Stage One. In the event that no decision in writing is received in accordance with the specified time limits in Stage One, the grievor may submit the grievance to the Deputy Minister or his designee within seven (7) days of the date that the supervisor was required to give his decision in writing in accordance with Stage One.
- 27.3.3 The Deputy Minister or his designee shall hold a meeting with the employee within fifteen (15) days of the receipt of the grievance and shall give the grievor his decision in writing within seven (7) days of the meeting.
- 27.4 If the grievor is not satisfied with the decision of the Deputy Minister or his designee or if he does not receive the decision within the specified time the grievor may apply to the Grievance Settlement Board for a hearing of the grievance within fifteen (15) days of the specified time limit for receiving the decision.
- 27.5 The employee, at his option, may be accompanied and represented by an employee representative at each stage of the grievance procedure.



On the basis of the foregoing the Union filed this complaint stating:

By way of written correspondence (signed by Susan Wolnik, with the designated authority of Peter H. Barnes and E.M. Sorin), to a Ms. L. Taylor, a Mr. D.R. Joseph and a Mr. Wayne Moore;

- (1) refused to recognize Mr. Pratt, OPSEU Staff Representative, as the representative of those employees.
- (2) denied M. Pratt, OPSEU Staff Representative, an opportunity to represent those members at a Stage Two grievance meeting.
- (3) dealt directly with those members contrary to the written request of M. Pratt OPSEU Staff Representative, addressed to the Deputy Minister and dated February 18, 1986 and contrary to Article 27.5 of the collective agreement.

The respondents admit, however, that their departure from practice in this case was an error and have undertaken to revert to their former practice. The real complaint of the Union is the failure of the respondents to deal directly with the staff representative as requested in the letter of February 18, 1986.

The union argues that as exclusive bargaining agent it has the right to direct the employer to deal solely with it on any given matter under the collective agreement, citing a number of cases under the comparable provisions of the Labour Relations Act in support. In particular, the Ontario Labour Relations Board in Canadian Union of Operating Engineers and General Workers, (1983) O.L.R.B. Report October 1633 wrote:

The legislation vests bargaining rights in a trade union and obliges an employer to deal with the union rather than with individual employees. An employer is required by statute to deal with a spokesperson chosen by a bargaining agent - to bargain in good faith and to address grievances. But management need not acknowledge employees or their representatives; indeed, direct dealings with the work force infringe upon a union's exclusive bargaining authority.





and further in Windsor Western Hospital, (1984) O.L.R.B. Report November 1643:

The whole scheme of our Act is to reverse the imbalance that exists between individual employee and employer. The Act provides for the certification of trade unions to act as collective representative for all of those falling within a bargaining unit found to be appropriate for collective bargaining. It is clear on a reading of the Act as a whole that the right to collective representation encompasses not only the negotiation of the collective agreement but the representation of individual employees in pursuit of or in protection of their rights under the collective agreement.

These statements of the law are not here in doubt. The problem with the Union's argument is that the grievance procedure negotiated by the bargaining agent itself provides for the employee to deal with his or her own grievance at the early stages of the grievance (not surprisingly, given the size of the government bargaining-unit). The protection contemplated by the Act to "reverse the imbalance" is provided in section 27.5, giving the employee the absolute right to be represented by a union representative at any stage of the procedure if he or she chooses. This is not a matter of a Union "waiving" its status as exclusive bargaining agent. As exclusive bargaining agent it has freely negotiated a grievance procedure which provides both flexibility of administration and the right of employees to invoke the aid of the bargaining agent at any stage that the employees desire. We do not see that the Union, particularly in a bargaining unit this large, would be well served by having us declare such provisions an abandonment of its statutory mandate.

The respondents argue that, notwithstanding the indication in the Union's February 18th letter that the individual employee had been sent a copy of the letter, the employer had nothing from the employee indicating that he or she had so exercised his or her option under section 27.5. In response to that, the Union agreed at the hearing to provide the employer in future with written notification of such election from the individual grievor's themselves. This understanding resolved the matter with respect to the Chilgren



Psychiatric Research Institutes whose management representatives were present at the hearing. The matter was not resolved, however, with respect to the Ministry of Community and Social Services itself, for whatever reason, and the Tribunal has been called upon to issue a formal decision in that broader regard.

The dispute represents a somewhat technical position being taken by the parties with respect to the representation issue, and may simply reflect a broader sense of estrangement in the present collective-bargaining relationship. The respondents, for their part, might have elected to find in the Union's letter of February 18th, purportedly copied to the individual grievors, the employee's consent they now require to have the Union assume sole carriage of the grievances. We accept, however, that the failure of the respondent following that letter to even copy the Union with the second-stage reply in accordance with past practice was nothing more than an administrative oversight, and not an attempt to "interfere" in the representation of employees by the Union. In addition, in light of the wording of this particular collective agreement, the Union has undertaken to provide to the employer in future the kind of direct authorization from the employees that the employer is asking for. In all the circumstances, it is the view of the Tribunal that the complaint on the facts presently before us ought to be dismissed.

DATED at Toronto, Ontario, this 27th day of February, 1987.

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M.G. Mitchnick, Alternate Chairman  
For the Tribunal

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W. Wright, Member

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M. J. ...











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The Crown Employees Collective Bargaining Act  
ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

T/39/85

**BETWEEN:** EUGENE BARRON PIGGOT  
("the Applicant")

**AND:** ONTARIO PUBLIC SERVICE EMPLOYEES UNION  
("the Respondent Employee Organization")

**AND:** MINISTRY OF COMMUNITY AND SOCIAL SERVICES  
("the Respondent Employer or Agency of the Employer")

**BEFORE:** M.G. Mitchnick, Alternate Chairman  
W. Walsh, Employee Member  
W.G. Wright, Employer Member

**FOR THE APPLICANT:** No One Appeared

**FOR THE RESPONDENT  
EMPLOYEE  
ORGANIZATION:** Peter Dashfield

**FOR THE RESPONDENT  
EMPLOYER:** No One Appeared

**HEARING DATE:** October 15, 1986



## DECISION

1. This is an application for exemption from the payment of union dues, pursuant to the provisions of section 16(2) of the Crown Employees Collective Bargaining Act, R.S.O., 1980, c. 108, as amended.

2. The applicant, however, failed to appear on the date scheduled for the hearing of this matter before the Tribunal in Toronto. Neither did the Tribunal receive any word from the applicant as to the reason for his non-attendance.

3. The respondent trade union did appear, however, and took the position that the applicant is not an individual to whom the provisions of section 16(2) of the Act apply.


4. Having regard to the failure of the applicant to appear and the absence of any evidence before the Tribunal to support the applicant's claim under section 16(2), the application must be and is hereby dismissed..

DATED at Toronto, Ontario this 3rd day of November, 1986.



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M.G. Mitchnick, Alternate Chairman  
for the Tribunal



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William Walsh, Employee Member



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William Wright, Employer Member











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The Crown Employees Collective Bargaining Act  
ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

T/0040/85

BETWEEN: J. DEREK PUGH, et al  
("the Applicant")

AND: ONTARIO PUBLIC SERVICE EMPLOYEES UNION  
("the Respondent Employee Organization")

AND: MANAGEMENT BOARD OF CABINET  
(Ministry of Government Services)  
("the Respondent Employer or Agency of the Employer")

BEFORE: M.G. Mitchnick, Chairman  
E.J. McIntyre, Member  
R.M. Drennan, Member

FOR THE APPLICANT: No One Appeared

FOR THE RESPONDENT  
EMPLOYEE ORGANIZATION: Peter Dashfield

FOR THE RESPONDENT  
EMPLOYER: No One Appeared

HEARING DATE: October 21, 1986

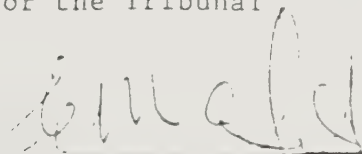


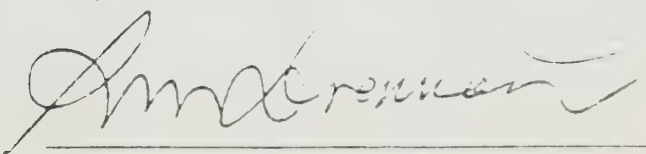
DECISION

1. This is an application for exemption from the payment of union dues, pursuant to the provisions of section 16(2) of the Crown Employees Collective Bargaining Act, R.S.O., 1980, c. 108, as amended, on behalf of the employees named in Schedule A.
2. The applicants failed to appear on the date scheduled for the hearing of this matter.
3. The respondent trade union did appear, however, and took the position that the applicants are not individuals to whom the provisions of section 16(2) of the Act apply.
4. Having regard to the failure of the applicants to appear and the absence of any evidence before the Tribunal to support the applicants' claim under section 16(2), the application must be and is hereby dismissed.

DATED at Toronto, Ontario this 25th day of November, 1986.

\_\_\_\_\_  
M.G. Mitchnick, Alternate Chairman  
for the Tribunal

  
\_\_\_\_\_  
E.J. McIntyre, Member

  
\_\_\_\_\_  
R.M. Drennan, Member



SCHEDULE A

---

. Derek Pugh  
6 Albion Road  
Rexdale, Ontario  
M9W 6A6

Mr. Mark Babcock  
12 - 31 Sentinel Road  
Downsview, Ontario  
M3M 2Y7

Mr. Johnaton Bannerman  
33 Maitland Street  
Apartment #314  
Toronto, Ontario  
M4Y 1C8

. Raimund F. Bayer  
Pinebrook Avenue  
Toronto, Ontario  
M6A 1Y8

Mr. Robert Bond  
250 Main Street West  
Hamilton, Ontario  
L8P 1J6

Mr. Michael Brawley  
66 Rave Road  
Toronto, Ontario  
M6L 2A7

Kevin Carrington  
McDonald Drive  
Toronto, Ontario  
M6G 2T4

. Maria Fabik  
- 10 Sentinel Road  
Downsview, Ontario  
M3M 2Y7

Mr. Anthony Fimiani  
124 Richbell Street  
Thornhill, Ontario  
L4J 3Z2

Mr. Brian Ford  
403 Selby Crescent  
Newmarket, Ontario  
L3Y 6E2

Bruce Hamilton  
90 Woodbine Avenue  
Toronto, Ontario  
M4C 4B9

Mr. Terry Ing  
78 Mill Street North  
Brampton, Ontario  
L6X 1T4

Mr. Douglas Jeffrey  
236 Albion Road  
Apartment #1102  
Rexdale, Ontario  
M9W 6A6

Mr. R. Wade Jones  
25 Rathburne Road East  
Apartment #18  
Mississauga, Ontario  
L4Z 1H5

Ms. Sharon Mandel  
470 Sentinel Road  
Apartment #1716  
Downsview, Ontario  
M3M 1J8

Mr. Graham Miles  
P.O. Box 431  
Sharon, Ontario  
LOG 1V0

Gurbux S. Mongia  
Van Horne Avenue  
Willowdale, Ontario  
M2P 2S6

Mr. Richard Pikulik  
1674 Bayview Avenue  
Apartment #306  
Toronto, Ontario  
M4G 3C3

Mr. Ted Prichard  
14 Camilla Crescent  
Scarborough, Ontario  
M1L 1Z1





Mr. Kenneth Raymond  
1504 - 235 Grandravine Drive  
Downsview, Ontario  
M3N 1J2

Mr. Peter Themelis  
66 Raven Road  
Toronto, Ontario  
M6L 2A7













